Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

FIN-AG, INC.,

*Petitioner,*

*v.*

PIPESTONE LIVESTOCK AUCTION MARKET, INC.; SOUTH DAKOTA LIVESTOCK SALES OF WATERTOWN, INC.; WATERTOWN LIVESTOCK AUCTION, INC.; and CIMPL'S, INC.,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

A federal statute, the Food Security Act of 1985 ("FSA"), 7 U.S.C. §1631, established uniform provisions for the protection of security interests in farm products sold through commission merchants as well as the protection of purchasers of farm products who comply with the FSA. In states that have established central filing systems, such as South Dakota and Minnesota, agricultural lenders have relied upon the FSA and expect that their name will be listed as co-payees on proceeds checks from sales of farm products collateral. The balance established by the FSA between the competing interests of lenders and purchasers who wish to take free and clear of security interests has proven to be workable for over twenty years. This balance, however, will likely come undone if the South Dakota Supreme Court's interpretation of the federal statute, which is in conflict with the language of the FSA and the recent decision of the Minnesota Supreme Court, is allowed to stand.

The question presented is whether a commission merchant or other purchaser of farm products is protected by the FSA when the debtor sells secured farm products using a fictitious name that is neither registered nor listed in the UCC/EFS filing with the state.

## PARTIES TO THE PROCEEDING

All of the parties to the proceeding are contained in the caption. The Respondents shall be collectively referred to as "Sale Barns".

## CORPORATE DISCLOSURE STATEMENT

Fin-Ag, Inc. is a wholly-owned subsidiary of its parent corporation, CHS, Inc. There are no publicly held corporations that own 10% or more of corporate stock.

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Petitioners pray for a writ of certiorari to review three interrelated decisions of the Supreme Court of South Dakota.

## OPINIONS BELOW

The opinions of the Supreme Court of South Dakota are reported at: 754 N.W.2d 1 (*Fin-Ag, Inc. v. Cimpl's, Inc.*); 754 N.W.2d 23 (*Fin-Ag, Inc. v. Watertown Livestock Auction, Inc.*); and 754 N.W.2d 29 (*Fin-Ag, Inc. v. Pipestone Livestock Auction Agency, Inc. and South Dakota Livestock Sales of Watertown, Inc.*). The cited opinions are set forth in the Appendix. App. A-2 - A-112.

The opinion of the Supreme Court of Minnesota is reported at 720 N.W.2d 579 (*Fin-Ag, Inc. v. Hufnagle, Inc., f/k/a P & H Trucking, et al.*). The cited opinion is set forth in the Appendix. App. A-113 - A-134.

## JURISDICTION

The final judgments by the Supreme Court of South Dakota were entered on June 18, 2008. Under South Dakota law, the filing of the opinion of the Supreme Court of South Dakota constitutes entry of judgment. Petitioner timely filed petitions for rehearing on their claims against the defendants regarding the Court's interpretation and application of the FSA. The petitions for rehearing were denied July 29, 2008. App. A-135 - A-140. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

## PERTINENT STATUTORY PROVISIONS

The pertinent statute is the Food Security Act of 1985, Pub. L. 99-198, Title XIII, § 1324, 99 Stat. 1535, as amended at 7 U.S.C. § 1631. The relevant provisions are reproduced in the Appendix. App. A-141 - A-157.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. The Food Security Act

One of the principal purposes of the Food Security Act was to modify the "farm products" exception codified in the Uniform Commercial Code ("UCC"). 7 U.S.C. § 1631(a)-(b). The general rule of UCC § 9-307 was that a "buyer in the ordinary course of business" would take goods free of a valid security interest, if the security interest was created by the seller of the goods. So, for example, if one purchased a hammer from the hardware store, any security interest (if the store had inventory financing) would not follow the hammer, but would attach only to the proceeds of the sale and the buyer would take the hammer free and clear. This general rule, however, did not apply to buyers of farm products. *Id.* "Thus, the UCC protected buyers in the ordinary course of business only from security interests created by the buyer's seller; and buyers of farm products were excluded from even this narrow protection." *Fin-Ag, Inc. v. Hufnagle, Inc.*, App. A-115.

The justification for this perhaps unduly strong protection of agricultural liens rested, in part, on the asserted unique nature of agricultural financing.

Charles W. Wolfe, *Section 1324 of the Food Security Act of 1985: Congress Preempts the "Farm Products Exception" of Section 9-307(1) of the Uniform Commercial Code*, 55 UMKC L.Rev. 454, 457 (1987).[1] Some states attempted to ameliorate the perceived unfairness the farm products exception. One consequence of this, however, was an inconsistent application of the UCC. Congress recognized this problem in the FSA House Report:

> These consideration[s] have led 20 states to "opt out" of the Farm Products Exception and establish their own central filing or notice systems. Under such conditions, the Uniform Commercial Code is hardly "uniform" anymore in this particular field. And with the increasingly interstate nature of agricultural marketing, this patchwork of rules and regulations has become intolerable for buyers and sellers of farm products alike. Application of the current myriad of state laws has created a substantial burden on interstate commerce in agricultural products. *A single federal rule is needed to restore consistency to this area of the law*, and remove that burden.
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> *H.R. Rep. 99-271(I)*, p. 109 (emphasis).

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[1] It may also be related to the fungibility of farm products, which makes the existence of liens harder to detect. Unlike motor vehicles, for example, that have VIN numbers, most agricultural products are not readily identifiable as to the owner, except in some areas of the country where cattle are branded, which was not the case here.

Congress enacted the Food Security Act to address the problem of inconsistent rules and the resulting burden that the farm products exception had created for interstate commerce in agricultural products. In so doing, Congress did not leave agricultural lenders without protection of their interests. Commission merchants, also known in the Midwest as "sale barns", are subject to the security interests created by the seller if the lender has filed an effective financing statement with the Secretary of State and the lender has not waived or released its security interest. 7 U.S.C. § 1631(g)(2)(D). In addition, the FSA retained an important provision from UCC 9-307 in that the protection for the farm products purchaser was limited to security interests "created by the seller":

> Except as provided in subsection (e) of this section [describing purchases subject to a security interest] and notwithstanding any other provision of Federal State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller; even though the security interest is perfected; and the buyer knows of the existence of such interest.
>
> 7 U.S.C. § 1631(d).

In striking a balance between lenders and third party purchasers of secured collateral, Congress did not provide that purchasers would take free of, or be protected from, all security interests. *Hufnagle*, App.

A-117 ("But the protection actually provided by section 1631 was not as sweeping as the statement of intent might suggest.").

It is fair to say that this balance has proven to be workable for over twenty years, as evidenced by the continuation of agricultural lending post-FSA and the relative lack of litigation under the new provisions. The question, however, is whether this balance will continue to hold as the courts deal with the problem of a debtor who seeks to avoid the strictures of a valid security interest by selling secured collateral under another name in order to evade the co-payee requirement for the proceeds check.

### 2. Application of the Food Security Act to this Case

Fin-Ag, Inc. ("Fin-Ag") made cattle and operating loans exceeding four million dollars to the Berwalds.[2] The loans were secured by cattle owned by the Berwalds. Fin-Ag duly filed a Financing Statement with the Secretary of State of South Dakota in order to give notice of Fin-Ag's secured interest in the cattle.

In August of 2004, Fin-Ag learned that collateral cattle had been sold by the Berwalds, using the name of C&M Dairy, to or through the Sale Barns. C&M Dairy was not listed on any of the financial statements or income tax returns submitted

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[2] The loans were made to certain individuals and entities, namely, Calvin Berwald, Michael Berwald, Kimberly Berwald, Berwald Brothers, Berwald Partnership, and Sokota Dairy, LLC (collectively referred to as "Berwalds").

to Fin-Ag. There were no fictitious name filings in the State of South Dakota under the name of C&M Dairy. For those sales made in the name of C&M Dairy, the Sale Barns did not list Fin-Ag as a co-payee on the proceeds checks. This practice was repeated many times, with several different sale barns, including the four sale barns involved in this litigation. The deception allowed the Berwalds to receive over one million dollars in proceeds free and clear. It did not, however, prevent their financial collapse and they eventually filed a Chapter 11 bankruptcy petition.

## B. Proceedings Below

### 1. The Trial Court Proceedings

Fin-Ag brought actions in state court against the Sale Barns for conversion, seeking damages equal to the amount of the payments tendered for the sale of the Berwalds' collateral cattle.[3] The Sale Barns claimed C&M Dairy was not listed in South Dakota's master list of the filed financial statements and therefore they were not obligated to list Fin-Ag as a co-payee. Fin-Ag and the Sale Barns brought cross-motions for summary judgment in each of the

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[3] One of the defenses offered by the Sale Barns was that Fin-Ag suffered no damage because the Berwalds' bankruptcy reorganization plan provided for full payment of its claim. Unfortunately, the "promise" of full payment is diminished by the reality that it will occur, if at all, only when the Berwalds are able, despite their history of financial distress and dishonesty, to convince another lender to re-finance their operation before the balloon payment deadline. In any event, any recovery in the state actions would be offset against Fin-Ag's bankruptcy claim against the Berwalds.

underlying actions. Summary judgment was granted in Fin-Ag's favor in two of the cases and in favor of one of the Sale Barns in another, and there was a "split" decision in the remaining case.[4] All decisions were appealed to the Supreme Court of South Dakota.

### 2. The Appeal to the South Dakota Supreme Court

Under the FSA, there are two ways in which a security interest will survive a sale to a third party purchaser. First, a purchaser does not take free from a security interest if the "seller" is a debtor whose name appears to the UCC/EFS filing with the Secretary of State. Thus, Fin-Ag argued that, if the Berwalds were considered the "seller," the Sale Barns would be subject to the security interest because the Berwalds were identified in South Dakota's master list. 7 U.S.C. § 1631(g)(2)(D). Second, a purchaser only takes free of security "created by the seller." 7 U.S.C. § 1631(d). Thus, if C&M Dairy was considered the "seller," the Sale Barns were only protected under the FSA for the security interests created by C&M Dairy. See also 7 U.S.C. § 1631(g)(1). Because C&M Dairy did not create any of the security interests in the cattle sold, the FSA did not provide the Sale Barns with protection and they were still subject to Fin-Ag's security interests in the cattle.

As further support of its position, Fin-Ag cited to the Supreme Court of Minnesota's decision in *Fin-*

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[4] In *Pipestone Livestock and South Dakota Livestock*, the trial court ruled in favor of the sale barns, except to the extent that the sale barn had acted as a lender in crediting sales proceeds against a previous open account.

*Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579 (Minn. 2006); App. A-113 - A-134. In *Hufnagle*, the Minnesota Supreme Court addressed a similar "fronting" situation and held that the FSA did not provide protection to the farm products dealer and upheld Fin-Ag's conversion claim. Fin-Ag argued to the Supreme Court of South Dakota that the only difference between *Hufnagle* and the present Sale Barn cases was that the Berwalds used a d/b/a to front their sales as opposed to the use of employees' or children's names in *Hufnagle*.

In holding that the FSA provided protection to the Sale Barns, the Supreme Court of South Dakota, in a 3 to 2 decision, concluded that the "seller", for purposes of written notice under § 1631(e)(3) and (g)(2)(D), was C&M Dairy. App. A-22. However, when addressing the FSA's limitation of protection to only those interests "created by the seller" under § 1631(d) and (g)(1), the Supreme Court of South Dakota concluded that the "seller" was not C&M Dairy, but instead was the Berwalds. App. A-34.

Justices Sabers and Konenkamp issued a vigorous dissent, stating that the majority misinterpreted and misapplied the FSA as evidenced by it defining "seller" two different ways within the same statute. The dissenting justices observed:

> The opinion can call it anything it wants, but it cannot hide what is plain and obvious. In its attempt to decide this case in favor of the Sale Barns, it arrives at some conflicting conclusions. For example, the opinion concludes that C&M Dairy is a "business entity" and

> therefore separate from Calvin and Michael Berwald and can be a seller under the statute, thus the FSA protects Sales Barns. Then, in the next portion of analysis, C&M Dairy is merely a d.b.a. and cannot be separated from the Berwalds, therefore C&M Dairy created the security interest and again, Sale Barns win. In reality, C&M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego - and certainly not both the "seller" and the "seller who created the security interest.
>
> App. A-41.

Underlying the majority's reading of the FSA was its belief that Congress intended to "shift the burden of potential loss from the buyers and commission merchants to the lenders who finance farm operations." App. A-11 (quoting *Merchantile Bank of Springfield v. Joplin Reg. Stockyards, Inc.*, 870 F.Supp. 278, 282 (W.D. Mo. 1994)). The dissent objected, however, that this was in conflict with the "created by the seller" limitation that Congress had expressly incorporated from UCC 9-307.[5] In other

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[5] The dissenting justices specifically stated:

> Significantly, despite its criticism, Congress included this clause ["created by the seller"] in section 1631 of the FSA when attempting to correct some of the other problems of buying food products under the UCC. [Citation omitted].
>
> White and Summers have discussed the difficulties with the "created by the seller" language. See 4 White & Summers, Uniform

words, the asserted "policy" of Congress was allowed to contravene the express provisions of the FSA.

## REASONS FOR GRANTING THE WRIT

The South Dakota Supreme Court has in effect created an approved roadmap for dishonest debtors to bypass UCC/EFS regulations and to wrongfully obtain proceeds from the sale of secured farm collateral. By interpreting the term "seller" differently within the FSA, it allows "fronting" sales and thereby has reduced the protections afforded to agricultural lenders. Such decision is contrary to the language of the FSA and is also in direct conflict with the Supreme Court of Minnesota's decision in *Fin-Ag, Inc. v. Hufnagle*.

### I. The Court Should Grant Review To Resolve the Conflict Between Two State Supreme Courts Regarding "Fronting" Sales Under the FSA.

In the absence of exclusive federal jurisdiction, state courts have the power to interpret federal law,

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Commercial Code § 33-13 (4th ed 1995 & Supp. 2007) (discussing the problems produced by the created by the seller language in former UCC § 9-307). Importantly, they theorize that: "Perhaps the drafters intended that as between two innocent parties the ultimate loss should fall on the party who dealt most closely with the 'bad guy.'" *Id.* Although this may conflict with the FSA policy, we have to presume that Congress knew what it was doing when it borrowed this language from the UCC.

App. A-42-43.

but their interpretations are subject to review in this Court. *Reed v. Farley*, 512 U.S. 339, 361 (1994) (there is an interest in promoting "uniformity in the state courts' interpretation and application of federal law"); *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Dept. of Business Regulation of Florida*, 496 US. 18, 29 (1990) ("State courts must interpret and enforce faithfully 'the Supreme Law of the Land,' and their decisions are subject to review by this Court."); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 307-08 (1816) (Congress recognized "the importance, and even necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution.") (emphasis in original); Rules of the Supreme Court of the United States, Rule 10(b).

The interpretation and application of the FSA is an important federal question that has a nationwide impact. The fact that South Dakota and Minnesota have interpreted and applied this federal statute differently on a matter that is now likely to recur frequently supports review by this Court. Moreover, South Dakota and Minnesota are neighboring states and farm producers may sell their products across state lines (as did happen in one of the cases here) and agricultural lenders may make loans across state lines and thus the conflicting opinions regarding the interpretation and application of the FSA must be resolved.

### A. Minnesota's Interpretation and Application of the FSA.

In *Fin-Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579 (Minn. 2006) (App. A-113 - A-134), the Supreme Court of Minnesota held that the FSA did not protect the purchaser in a "fronting" sale. Fronting sales occur when "a seller of farm products that are subject to a security interest has a third party sell them under the third party's name." App. A-122. The debtors, Larry and Ronda Buck, sold collateral corn under their employees' and minor children's names to Kent Meschke Poultry Farms. Meschke was a registered farm products dealer who had received Minnesota's master list of sellers and thereby had notice of those debtors who were subject to security interests. Meschke defended against Fin-Ag's conversion claim, arguing that he was entitled to protection under the FSA because the corn was sold by parties who were not on the master list.

In addressing the grain purchaser's claims, the *Hufnagle* court carefully considered the history of the FSA, including what Congress had changed and what it had not changed through the legislation, and explicated the federal protection as follows:

> To summarize, under 7 U.S.C. § 1631 a buyer of farm products in the ordinary course of business (1) takes free of security interests created by the seller, unless notice of the seller-created security interest has been given by one of three specific notice procedures, which include the Minnesota central filing

> system provided under chapter 336A; but (2) takes subject to security interests created by someone other than the seller.
> App. A-119.

The *Hufnagle* court affirmed the granting of summary judgment in favor of Fin-Ag. It noted the ambiguity of who was the "seller" under the FSA, but concluded that the same result would be reached regardless of whether the debtors treated as the seller or the "fronting" persons were treated as the seller:

> If we view Buck [the debtors] as the seller, assuming that the Tookers [the fronting individuals] sold the corn as agents for Buck as an undisclosed principal, the exception in section 1631(e) for a security interest as to which notice has been given would apply because Meschke [the purchaser] received notice of Fin Ag's interest against Buck, and Meschke did not secure a waiver of the interest from Fin Ag. See 7 U.S.C. § 1631(e)(3). Accordingly, Meschke's interest in the corn would be subject to Fin Ag's security interest.
> App. A-126.

If, on the other hand, the fronting persons are to be regarded as the "seller," then other provisions of the FSA become applicable. If the fronting persons "sold" the collateral as "commission merchants" or "selling agents," they are subject to the security interest if they have failed to register with the Secretary of State and the secured lender has filed an effective financing statement. 7 U.S.C. 1631(g)(2)(C).

If the fronting persons "sold" the corn on their own behalf, the sale to the purchasers would only be free of any security interest created by the "sellers," i.e., the fronting persons, and thus would be subject to the security interest created by the debtor, who is not the seller. 7 U.S.C. § 1631(d). The *Hufnagle* court concluded that under all possible factual scenarios, the purchaser in a fronting situation takes subject to the security interest. App. A-126-128.

> The inclusion of the "created by the seller" clause in section 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties. Under the facts of this case, no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest. This is because if we view Buck as the seller, we must conclude that Meschke's rights are subject to Fin Ag's security interest under section 1631 because Fin Ag filed an "effective financing statement" that put Meschke on notice of Fin Ag's security interest in Buck's products. And, if we view the Tookers as the sellers, we must conclude that Meschke's rights are subject to Fin Ag's security interest, under either section 1631 or Minnesota's UCC, because both statutes only protect a buyer from a security interest created by the seller

> and not from a security interest created by an undisclosed owner, which continues in the product despite the sale. App. A-125.

The Minnesota Supreme Court's ruling was faithful to the language of the FSA and was consistent with the balance the FSA had established to protect both lenders' and purchasers' interests. The decision implicitly recognizes that the balance comes undone, rather easily, if a dishonest debtor may circumvent the rules simply by selling through a fronting person.

### B. South Dakota's Interpretation and Application of the FSA.

Subsequent to *Hufnagle*, the Supreme Court of South Dakota was presented with cases that were virtually identical on their facts. The only difference was that the Berwalds used a d/b/a, "C&M Dairy," to front their sales rather than using employees' or family members' names. Instead of following the *Hufnagle*'s analysis of the FSA, the majority posed the matter this way:

> Because C&M Dairy was the only identified seller in the sales at issue, there are two "seller" questions that must be resolved to determine whether the FSA protected [the Sale Barn]: (1) was C&M Dairy the seller of the cattle within the meaning of the written notice exception of the FSA; and (2) should C&M Dairy be regarded as the seller who

> created Fin-Ag's security interest within the meaning of the FSA limitation.
>
> App. A-14.

The majority concluded that C&M Dairy was the "seller" under the FSA and not the Berwalds. App. A-22. As a consequence, Fin-Ag could not prevail under 7 U.S.C. § 1631(e) because C&M Dairy was not listed on the state master list. The court, however, also concluded that the *Berwalds* were the "seller" when applying the "created by the seller" exception to the protection. App. A-34.

1. The Fronting Entity as a Separate and Distinct "Seller."

The majority concluded that C&M Dairy, as either an informal partnership, joint venture, or other association, came within the FSA definition of "seller" that included "any other business entity." App. A-16-17. 7 U.S.C. § 1631(c)(10). It noted that the South Dakota Administrative Rules for implementing the FSA central filing system provided that the "use of doing business as is considered an additional debtor and shall be listed as such . . . ." App. A-19-20. Thus, it was the lender's burden to discover whether the debtor was using a d/b/a "entity"[6] as part of a fraudulent scheme to defeat the lender's security interest. App. A-20-21.

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[6] In this case, the d/b/a was not registered even though this was a requirement of South Dakota law. S.D.C.L. 37-11-1. The "C&M" of C&M Dairy corresponded to the initials of the two principal debtors, Calvin and Michael Berwald.

2. The Fronting Entity as the "Alter Ego" of the Debtor.

Having decided that the "seller" for purposes of the notice provision was C&M Dairy, the majority turned to the second question, whether the Sale Barns would take free of a security interest "created by the seller." C&M Dairy, of course, created no security interest in any cattle, much less the cattle involved in any of the underlying transactions. The security interest of Fin-Ag was created by the Berwalds and the majority had just concluded that the Berwalds were not the seller.

In order to deal with this difficulty, the majority concluded that "as the alter ego of Berwalds, C&M Dairy should be regarded as the seller who created the security interest within the meaning of 7 U.S.C. § 1631(d)." App. A-31. In other words, even though C&M Dairy did not create the security interest, the Berwalds did and C&M Dairy is so close to the Berwalds as to be their "alter ego" and should be regarded as having created the security interest.

The dissent strongly criticized this approach: "In reality, C&M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego -- and certainly not both the 'seller' and the 'seller who created the security interest.'" App. A-41. The dissenting justices agreed with the *Hufnagle* court and identified the majority's inconsistent interpretations of the term "seller" under the FSA:

> There are two different interpretations of a supposed entity, yet the same

> strained outcome. When defining "seller," it is inconsistent to say that in one instance C&M Dairy is an entity distinct from the Berwalds, so C&M Dairy can be the seller and claim Sale Barns did not receive notice of Fin-Ag's security interest, and then to say the Berwalds and C&M Dairy are "one and the same" in order to find C&M Dairy is the "seller who created the security interest." In *Hufnagle*, the Minnesota Supreme Court specifically refused to "define seller two different ways in the same analysis without a significant indication that this was the legislature's intent. No such indication [of legislative intent] exists here." 720 NW2d at 588-89. We should not interpret seller two different ways.
>
> App. A-41-42.

Consistency in the interpretation and the application of a single term appearing more than once in a federal statute is the "normal rule of statutory construction." As this Court stated in *Gustafson v. Alloyd Company, Inc.*, 513 U.S. 561, 570 (1995):

> The 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the "normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning." *Department of Revenue of Ore.*

> *v. ACF Industries, Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 849, 127 L.Ed.2d 165 (1994) (internal marks and citations omitted); see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230, 113 S.Ct. 2578, 2591, 125 L.Ed.2d 168 (1993); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932). That principle applies here. If the contract before us is not a prospectus for purposes of § 10 -- as all must and do concede -- it is not a prospectus for purposes of § 12 either.

As a policy matter, the dissenting justices charged that the majority's approach effectively sanctioned the Berwald's fraudulent scheme:

> The opinion's analysis of this issue sends the message to deceitful debtors that they can avoid the security interest if they use their initials as a fictitious name to sell their collateral to sale barns. The opinion blindly accepts the answer of the driver of the cattle truck to the yardman that the seller is "C&M Dairy," even if the driver of the truck is Calvin Berwald, Michael Berwald or their Father, Arlen Berwald. Interpreting the statutes in this manner produces the exact result we should prohibit – absurd. The opinion claims the burden should be on the lender, the party who is more capable of policing this problem.

> However, it seems it would be next to impossible for a lender to prevent its debtor from creating a fictitious name, with no fictitious name filing, and selling cattle under that name, while it would be relatively easy for the Sale Barn to dig past the fictitious name and inquire as to the proper owner and seller of the cattle.
>
> App. A-44-45.

There is a direct conflict between Minnesota's and South Dakota's interpretation of the Food Security Act and only this Court can authoritatively clarify the interpretation and application of the FSA. Because farm products are sold nationally and across state lines, the protections afforded under the FSA need to be clarified so that there can be uniformity amongst the states in regard to farm products sales and the protection of security interests. The conflict will have an immediate affect on interstate lending and the sale of farm products due to the inconsistent application of the FSA between the states.[7]

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[7] Although not directly on point, the decision in *Agriliance, LLC v. Runnells Grain Elevator, Inc.*, 272 F.Supp.2d 800 (S.D. Iowa 2003), suggests that Iowa may fall on the Minnesota side of this conflict. In that case, the federal district court noted the grain elevator's failure to properly inquire and protect secured lender's interest in the crops and stated:

> It appears that grain elevators, in the business of purchasing grain, rely primarily on the word of the seller or representative delivering the grain to distinguish and identify the crops they are purchasing. But even assuming that the business of grain brokerage is conducted on the same informal basis as Runnells' operations, the

## II. The Court Should Grant Review to Correct the South Dakota Supreme Court's Erroneous Recognition of a Fronting Entity as a "Seller" Under the FSA.

The prospect that dishonest farm debtors may escape the strictures of valid security interests simply by creating a fictional name and selling under that

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> Court does not believe that Runnells' lack of actual knowledge that the crops were the ones subject to the Agriliance interest shields it from liability. Having received a Food Security Act notice, Runnells was obligated to maintain a mechanism that would properly protect the interests of the secured party. Here, Runnells knew that the Mitchells' 2001 crops were subject to Agriliance's security interest. Marvin Mitchell was also the party who delivered the crops and with whom they had directly negotiated the purchase. On these facts, Runnells should have known that the crops were quite possibly 2001 crops owned by the Mitchells and could therefore be subject to Agriliance's interest. . . . Thus, Runnells' failure to determine whether the crops delivered by the Mitchells were subject to Agriliance's interest evidences a reckless disregard for Agriliance's claim to the crops, which constitutes a wrongful intent to exercise control over the crops and their proceeds to the detriment of Agriliance.
>
> 272 F.Supp.2d at 806-07.

The *Agriliance* court's interpretation and application of the Food Security Act regarding the delivery and sale of crops is more closely aligned with the *Hufnagle* decision because it recognizes that lack of knowledge of the security interest does not necessarily shield the elevator from liability for conversion.

name will become a self-fulfilling prophecy if the decision of the South Dakota Supreme Court is allowed to stand. The problem, as identified by the dissenting justices below, lies in the recognition of and granting "seller" status to a fictional entity that does not own the collateral. Whenever there is fronting person or entity, used solely for the purpose of filtering off the security interest, the balance established by Congress, with its rules to protect both lenders and farm products purchasers, is jeopardized. This Court should grant review to correct the erroneous interpretation of the FSA by the South Dakota Supreme Court.

### III. The Court Should Grant Review to Clarify That a Sale by a Fronting Entity Does Not Allow a Purchaser To Take Free and Clear of a Security Interest Created By the Debtor.

Congress incorporated the "created by the seller" language of 7 U.S.C. § 1631(d) directly from UCC § 9-307. In order to retain the viability of this requirement, this Court should grant review to clarify that a term in a federal statute, here "seller," must have a consistent meaning throughout the FSA. Without such a clarification, the dishonest debtor can easily circumvent any co-payee requirement through a fronting sale. Under the South Dakota Supreme Court's interpretation of the FSA, the dishonest debtor gets the benefit of hiding the true identity of the seller, while enjoying the advantage selling collateral free and clear of all security interests.

## CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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**APPENDIX A**

*Fin-Ag, Inc. v. Cimpl's, Inc.*,
754 N.W.2d 1 (S.D. 2008). . . . . A-2 - A-47

*Fin-Ag, Inc. v. Watertown Livestock Auction, Inc.*,
754 N.W.2d 23 (S.D. 2008) . . . . . A-48 - A-60

*Fin-Ag, Inc. v. Pipestone Livestock Auction Agency, Inc. and South Dakota Livestock Sales of Watertown, Inc.*,
754 N.W.2d 29 (S.D. 2008). . . . . A-61 - A-112

**APPENDIX B**

*Fin-Ag, Inc. v. Hufnagle, Inc., f/k/a P & H Trucking, et al.*,
720 N.W.2d 579 (MN 2006) . . . . . A-113 - A-134

**APPENDIX C**

Orders Denying Petitions for Rehearing....A-135-A-140

**APPENDIX D**

7 U.S.C.A. § 1631 Food Security Act. . . A-141 - A-157

Supreme Court of South Dakota.
FIN-AG, INC., Plaintiff and Appellant,
v.
CIMPL'S, INC., Defendant and Appellee,
and
Dacotah Bank, Defendant.
No. 24172.
Argued Jan. 8, 2007.
Decided June 18, 2008.

ZINTER, Justice.

[¶ 1.] This appeal arises from an action for conversion by Fin-Ag, Inc. against Cimpl's, Inc. Fin-Ag alleges that it had a security interest in cattle Cimpl's purchased, and that Cimpl's converted Fin-Ag's collateral by failing to remit cattle sale proceeds to Fin-Ag. On cross-motions for summary judgment, the circuit court granted summary judgment to each party according to the timing of and participants in each sale. Fin-Ag appeals adverse rulings on those sales in which the circuit court concluded that Cimpl's took free of Fin-Ag's security interest. The principal issue we address is the nature of the protection provided to buyers of farm products under the Food Security Act (FSA), 7 USC § 1631(1985). We affirm.

## I.

[¶ 2.] On June 27, 2002, Fin-Ag entered into an Agricultural Security Agreement (ASA) with Berwald Brothers,[FN1] Calvin Berwald, Michael Berwald, Kimberly Berwald, and Sokota Dairy, LLC (collectively Berwalds). The ASA granted Fin-Ag a

security interest in collateral owned by Berwalds, including farm products (cattle). Under the ASA, all proceeds of cattle sales were to be jointly payable to Berwalds and Fin-Ag. The ASA also provided that, except for inventory, no provision of the ASA could be interpreted to authorize any sale of collateral unless authorized by Fin-Ag in writing.

FN1. Berwald Brothers is a general partnership, including Calvin and Michael Berwald as general partners.

[¶ 3.] On July 2, 2002, Fin-Ag filed a Uniform Commercial Code (UCC) financing statement with the Secretary of State. The parties agree that this qualified as an "effective financing statement" (EFS) under*4 the FSA. The UCC financing statement listed Berwalds[FN2] as debtors and identified all livestock and farm products as collateral. The EFS portion described the covered farm products as dairy cattle and milk.

FN2. Although Berwald Brothers executed the ASA, the financing statement and EFS refer to "Berwald Partnership" with no reference to "Berwald Brothers." This discrepancy was not raised as an issue on appeal.

[¶ 4.] On August 26, 2002, Fin-Ag and Berwalds executed a promissory note in the amount of $460,000, and on January 8, 2003, they executed a second promissory note in the amount of $4,110,000. The notes were secured by the cattle, as well as the other property described in the ASA. On August 23, 2004, Berwalds defaulted on the promissory notes and filed a Chapter 11 bankruptcy. Berwalds ultimately filed an amended plan of reorganization, which required Berwalds to pay Fin-Ag the entire

balance of its loans plus interest, costs, and Fin-Ag's attorney fees. This dispute arose as a result of several pre-default cattle purchases by Cimpl's.

[¶ 5.] Cimpl's is a meat packing plant that purchases cattle for slaughter in the ordinary course of business. It was registered with the South Dakota Secretary of State's central filing system for effective financing statements. Therefore, each month Cimpl's received portions of the master list identifying Fin-Ag's debtors and collateral subject to security interests.

[¶ 6.] When Cimpl's purchased cattle, the person delivering the cattle signed a "Cattle Receiving Ticket" showing the delivery information. The receiving ticket specifically identified the seller, as well as the number, condition, and weight of the cattle. The cattle at issue were delivered by Austin, Calvin, Michael, or Arlen Berwald. Cimpl's was informed the cattle were being sold by "C & M Dairy."[FN3] Cimpl's was not aware that C & M Dairy was a d.b.a. used by Calvin and Michael Berwald to buy and sell cattle.[FN4]

FN3. Almost identical commission merchant purchases and sales under the name C & M Dairy were also being made through Stockmen's Livestock Market, Inc., Pipestone Livestock Auction Market, Inc., South Dakota Livestock Sales of Watertown, Inc., and Watertown Livestock Auction, Inc. *See Fin-Ag, Inc. v. Pipestone Livestock Auction Market, Inc.* and *Fin-Ag, Inc. v. South Dakota Livestock Sales of Watertown, Inc.*, 2008 SD 48, 754 N.W.2d 29; and *Fin-Ag, Inc. v. Watertown Livestock Auction, Inc.*, 2008 SD 49, 754 N.W.2d 23.

FN4. Berwalds had provided information to Cimpl's suggesting that Arlen, who was not one of Fin-Ag's debtors, was the owner of the business C & M Dairy. In September 2003, in an effort to obtain information regarding the seller, Cimpl's sent C & M Dairy a check for cattle and enclosed a postcard requesting additional payee information. The card was returned to Cimpl's, listing Arlen Berwald as the contact person for the C & M Dairy business, along with Arlen's address and phone number. Arlen's social security number was provided as the business's tax identification number. Neither that address nor that social security number matched any of those on Fin-Ag's EFS.

The record does not support the dissent's factual assertion that buyers "knew they were dealing with Berwalds fronting as C & M Dairy," *see infra* ¶ 67 n. 19. If anything, the record suggests it was Fin-Ag that was aware that Berwalds were conducting their cattle business under the d.b.a. C & M Dairy. *See infra* n. 7 (highlighting Fin-Ag's answer in a prior lawsuit wherein it admitted that "Berwalds, d/b/a C & M Dairy owned and operated a dairy operation in Toronto, South Dakota"). In any event, the dissent's assertion is legally irrelevant because:

> ... a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, *even though* the security interest is perfected; and *the buyer knows of the existence of such interest.*

7 USC § 1631(d) (emphasis added). *See also infra* ¶ 17.

***5** [¶ 7.] Because C & M Dairy was the only entity identified as the seller at the time of sale, Cimpl's reviewed the most recent master list to determine if C & M Dairy was subject to an EFS. C & M Dairy was not on the master list, and therefore Fin-Ag was not made a co-payee on the proceeds checks. Instead, Cimpl's issued the checks to C & M Dairy in care of Arlen Berwald.[FN5] Ultimately, the sales proceeds

were not remitted to Fin-Ag by C & M Dairy, Arlen Berwald or the Berwalds.[FN6] The sales at issue involve approximately 650 head of cattle sold between April 13, 2003, and July 23, 2004, for $283,973.55.[FN7]

FN5. Arlen Berwald is the father of Calvin and Michael Berwald. Arlen made nine of the 128 deliveries of cattle in this case. Arlen was not a signatory to the ASA.

FN6. Cal Berwald was a Fin-Ag debtor. With two exceptions that are not relevant to this appeal, when Cal Berwald Dairy was identified as the seller, Cimpl's listed Fin-Ag as a co-payee on the proceeds checks.

FN7. Fin-Ag claims it was not aware Berwalds were selling cattle to Cimpl's without permission under the name C & M Dairy until August 20, 2004. However, in July 2002, Calvin Berwald submitted a request for disbursement of funds to Fin-Ag in order to purchase cattle. The request was supported by an attached yard receipt from Watertown Livestock Auction, Inc. as proof of the purchase. The yard receipt listed "C-M Dairy" as the purchaser. Fin-Ag subsequently disbursed funds for C & M Dairy's purchases. Additionally, in October 2002, R & J Van Beek, LLC started a lawsuit against Berwalds, "d/b/a C & M Dairy" and Fin-Ag. The lawsuit arose when Calvin and Michael Berwald, d/b/a C & M Dairy, sold 150 head of cattle to R & J Van Beek. The purchase order, incorporated into the complaint, specifically listed C & M Dairy as the seller. In its answer in that lawsuit, Fin-Ag admitted that Berwalds, d/b/a C & M Dairy, owned and operated a dairy operation in Toronto, South Dakota. However, Fin-Ag never amended its financing statement/EFS to include C & M Dairy as a debtor.

[¶ 8.] On April 13, 2005, Fin-Ag commenced this action against Cimpl's. Fin-Ag alleged that Cimpl's converted Fin-Ag's collateral by not remitting the proceeds to Fin-Ag or listing Fin-Ag as a co-payee on the checks. The parties filed cross-motions for

summary judgment. The circuit court entered summary judgment in favor of Fin-Ag in the amount of $3,298.14 for proceeds Cimpl's remitted to Cal Berwald Dairy because Cal Berwald was on the master list. The court granted summary judgment in favor of Cimpl's for sales occurring prior to April 13, 2003, as they were barred by the statute of limitations in SDCL 57A-9-609.1. These two rulings have not been appealed. The court finally granted summary judgment in favor of Cimpl's for its remaining purchases from C & M Dairy. The essence of the court's ruling was that: (1) C & M Dairy was the seller for purposes of notice under the FSA; (2) C & M Dairy was not on the master list and therefore Cimpl's did not receive written notice of Fin-Ag's security interest as required by the FSA; and as a result, (3) the FSA protected Cimpl's as a buyer in the ordinary course for those remaining purchases. Thereafter, Cimpl's filed an affidavit and notice of taxation of costs (disbursements). Fin-Ag objected to portions of Cimpl's claim. The circuit court granted Cimpl's disbursements in the amount of $1,848.62.

[¶ 9.] Fin-Ag appeals, raising two issues:

Whether the FSA protected Cimpl's from liability for conversion.

Whether the circuit court abused its discretion in awarding Cimpl's disbursements.

***6** **II.**

**A.** *FSA Protection from Conversion in Purchasing Farm Products in the Ordinary Course of Business*

[¶ 10.] Fin-Ag argues that FSA protection for the buyers of farm products was not available to Cimpl's for two reasons. First, Fin-Ag argues that for purposes of notice, and despite the fact that C & M Dairy was the only identified seller in each instance: (1) Berwalds were the sellers; (2) Berwalds were listed as sellers on the master list; and therefore, (3) Cimpl's had written notice of Fin-Ag's security interest thereby disqualifying Cimpl's from protection under the notice exception of the FSA. Second, Fin-Ag points out that the FSA limits Cimpl's protection to take free of security interests "created by [Cimpl's] seller." *See* 7 USC § 1631(d). Therefore, Fin-Ag argues that even if C & M Dairy was the "seller" for purposes of the notice exception of the FSA, C & M Dairy did not create the security interest, Berwalds did. Accordingly, Fin-Ag argues that FSA protection was unavailable under the "created by the seller" limitation of the FSA, and Cimpl's was liable for the state law claims of conversion.

[¶ 11.] Our standard of review of the circuit courts summary judgment is well-settled:

> In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and [established] entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party[,] and reasonable doubts should be resolved against the moving party.... Our task

> on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied.

*Consol. Nutrition, L.C. v. IBP, Inc.*, 2003 SD 107, ¶ 8, 669 N.W.2d 126, 129 (citations omitted) (alterations in original).

[¶ 12.] To develop a proper framework for the analysis of the issues, we restate the history and purpose of the FSA. "Prior to 1985, the UCC generally reflected a policy that favored the rights of the holders of security interests." *Fin Ag, Inc. v. Hufnagle, Inc.*, 720 N.W.2d 579, 581 (Minn.2006). Under the UCC, a security interest in goods continued despite sale of those goods by the debtor. *Id.* (citing UCC § 9-306) (1972) (amended 2000); 3B ULA 33-34 (2002). Although the UCC recognized an exception for "buyers in the ordinary course of business," that exception did not apply to buyers of farm products. *Id.* (citing UCC § 9-307) (1972) (amended 2000); 3B ULA 154 (2002). Therefore, buyers of farm products were not protected from security interests created by their sellers. *Id.* Congress noted that this "farm products exception ... force[d] innocent buyers of farm products to become unwilling loan guarantors, in essence assuming the credit supervision responsibilities that rightly belong with the lender who [was] making the profit off the loan to begin with." H.R. Rep. No. 99-271(I) at 108-9 (1985), U.S.Code Cong. & Admin.News 1985 at 1103, 1209-10.

[¶ 13.] Because Congress was concerned with this impact of the UCC on buyers of farm products, it

enacted the FSA. *Hufnagle,* 720 N.W.2d at 582. The Congressional findings for enactment of the FSA are particularly relevant in this case:

> Congress finds that-
>
> (1) certain State laws permit a secured lender to enforce liens against a purchaser of farm products even if the purchaser*7 does not know that the sale of the products violates the lender's security interest in the products, lacks any practical method for discovering the existence of the security interest, and has no reasonable means to ensure that the seller uses the sales proceeds to repay the lender;
>
> (2) these laws subject the purchaser of farm products to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender;
>
> (3) the exposure of purchasers of farm products to double payment inhibits free competition in the market for farm products; and
>
> (4) this exposure constitutes a burden on and an obstruction to interstate commerce in farm products.

7 USC § 1631(a).

[¶ 14.] Congress enacted the FSA to alleviate these concerns by removing such burdens on and obstructions to interstate commerce in farm products. 7 USC § 1631(b). " 'To achieve this purpose,

the Act shifts the burden of potential loss from the buyers and commission merchants to the lenders who finance farm operations.' " *Mercantile Bank of Springfield v. Joplin Reg. Stockyards, Inc.*, 870 F.Supp. 278, 282 (W.D.Mo.1994) (quoting *Food Servs. of Am. v. Royal Heights, Inc.*, 69 Wash.App. 784, 850 P.2d 585, 587 (1993) (citing *Lisco State Bank v. McCombs Ranches, Inc.*, 752 F.Supp. 329, 334 (D.Neb.1990))).

[¶ 15.] Thus, the FSA generally protects a buyer of farm products from liability for conversion. It does so by preempting UCC provisions and creating a general rule protecting buyers in the ordinary course of business who purchase farm products subject to a lender's security interest. Notably, the House Reports make clear that the FSA was specifically intended to remove the buyer's obligation to diligently check public records:

> [The FSA was] ... intended to preempt state law (specifically the so called "farm products exception" of [UCC] Section 9-307) to the extent necessary to achieve the goals of this legislation. Thus, this Act would preempt state laws that set as conditions for buyer protection of the type provided by the bill requirements that the buyer check public records, obtain no-lien certificates from the farm products sellers, or otherwise seek out the lender and account to that lender for the sale proceeds.

H.R. Rep. No. 99-271(I) at 110, U.S.Code Cong. & Admin.News 1985 at 1211. Additionally, the

protection is afforded even if the buyer has actual knowledge of the existence of that security interest:

> ... a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.

7 USC § 1631(d).

[¶ 16.] The protection is, however, subject to notice exceptions and one limitation. "Under the [ ] notice exceptions[,] a buyer of farm products takes subject to a security interest created by the seller when notice has been given by one of three specified notice procedures." *Hufnagle*, 720 N.W.2d at 582 (citing 7 USC § 1631(e)). Under the notice exception at issue in this case, no FSA protection is afforded if the state establishes a central filing system and the buyer receives written notice under that system that the seller and the collateral are subject to an EFS. **8* 7 USC § 1631(e)(3).[FN8]

FN8. The exception provides:

> (e) A buyer of farm products takes subject to a security interest created by the seller if-
> (3) in the case of a farm product produced in a State that has established a central filing system, the buyer-
> (A) receives from the Secretary of State of such State written notice as provided in subsection (c)(2)(E) or (c)(2)(F) that specifies both the seller and the farm product being sold by such seller as being subject to an effective financing statement or notice; and

> (B) does not secure a waiver or release of the security interest specified in such effective financing statement or notice from the secured party by performing any payment obligation or otherwise.

7 USC § 1631(e)(3).

[¶ 17.] Significantly, the FSA specifically provides that a buyer of farm products is subject to a security interest only if the *secured party* complies with this notice exception in 7 USC § 1631(e). 7 USC § 1631(d) (emphasis added). Further, "the FSA deleted the 'good faith and without knowledge' requirement to protect buyers even though they know of the existence of a perfected security interest." *Farmers & Merchants State Bank v. Teveldal,* 524 N.W.2d 874, 878 (S.D.1994) (citing *Lisco State Bank,* 752 F.Supp. at 334). Consequently, "the test is not whether [the buyer] had actual notice that the sale violated a security interest, but whether [the buyer] takes subject to the [secured party's] security interest because there was compliance [by the secured party] with one of the exceptions defined in the Act." *Ashburn Bank v. Farr,* 206 Ga.App. 517, 426 S.E.2d 63, 65 (1992).

[¶ 18.] In addition to the notice exceptions, there is one limitation on the protection afforded buyers in the ordinary course. A buyer only takes free of security interests "created by the seller" from whom the buyer acquired the farm product. 7 USC § 1631(d). This limitation is similar to the "created by the buyer's seller" limitation in SDCL 57A-9-320 [FN9] ( UCC § 9-320, formerly § 9-307) for those who buy in the ordinary course of business. *Hufnagle,* 720 N.W.2d at 582. Under the FSA limitation, there is

generally no protection if the underlying security interest was created by someone other than the buyer's immediate seller. *Id.*

FN9. SDCL 57A-9-320(a) provides:

> Except as otherwise provided in subsection (e), a buyer in ordinary course of business, other than a person buying farm products from a person engaged in farming operations, takes free of a security interest *created by the buyer's seller*, even if the security interest is perfected and the buyer knows of its existence.

(Emphasis added).

[¶ 19.] Accordingly, under the applicable notice exception, Cimpl's took subject to Fin-Ag's security interest if Fin-Ag's EFS in the Secretary of State's master list provided written notice that the seller and the cattle were subject to Fin-Ag's security interest. 7 USC § 1631(e)(3). And, under the limitation, Cimpl's took subject to Fin-Ag's security interest if the security interest was created by someone other than Cimpl's immediate seller. 7 USC § 1631(d). Because C & M Dairy was the only identified seller in the sales at issue, there are two "seller" questions that must be resolved to determine whether the FSA protected Cimpl's: (1) was C & M Dairy the seller of the cattle within the meaning of the written notice exception of the FSA; and (2) should C & M Dairy be regarded as the seller who created Fin-Ag's security interest within the meaning of the FSA limitation.[FN10]

FN10. The circuit court did not address the question whether C & M Dairy should be regarded as the seller who created the security interest.

***9 B.**

*Who Was the Seller For Purpose of Written Notice?*

[¶ 20.] Although the term "seller" is employed for these purposes in the FSA, it is, unfortunately, undefined. 7 USC § 1631(c). When the text of a statute is unclear, courts "must look beyond the bare text of [the statute] to the context in which it was enacted and the purpose it was designed to accomplish." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 377, 124 S.Ct. 1836, 1842, 158 L.Ed.2d 645 (2004). Similarly, "where there is 'ambiguity in the statutory language,' we must 'look beyond the statutory language to [legislative history and] the statute's purpose to determine its meaning.' " *Garcia v. Dept. of Homeland Sec.*, 437 F.3d 1322, 1350 (Fed.Cir.2006) (quotation and citation omitted) (alteration in original).

[¶ 21.] In determining the meaning of the term "seller," Fin-Ag points out that South Dakota's Uniform Commercial Code defines "[s]eller" as "a person who sells or contracts to sell goods." SDCL 57A-2-103(1)(d). Under this definition, Fin-Ag argues that C & M Dairy must be a "person" in order to be considered the "seller." Fin-Ag argues that C & M Dairy was a fictitious name used by Berwalds, and therefore C & M Dairy was not a "person" within the notice exception of the FSA. We disagree.

[¶ 22.] The FSA defines "person" as "any individual, partnership, corporation, trust, or *any other business entity*." 7 USC § 1631(c)(10) (emphasis added); *see*

*also* 9 CFR § 205.102 ("other entity" included as "person").[FN11] In this case, there is no dispute that Berwalds did significant business buying and selling cattle under their business d.b.a. C & M Dairy. Although there was no fictitious name filing for C & M Dairy, all business entities need not register, incorporate, or comply with formal statutory procedures to exist and transact business. For example, a partnership, which requires neither written articles of co-partnership nor an express agreement, is recognized merely by conduct of the parties. *Rotzien v. Merchants' Loan & Trust Co.*, 41 S.D. 216, 170 N.W. 128, 129-30 (1918); *see also* SDCL 48-7A-202 (providing "the association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership"). Similarly, registration or filing is not a necessary element for the creation of a joint venture, *see Harriman v. United Dominion Indus., Inc.*, 2005 SD 18, ¶ 22, 693 N.W.2d 44, 50, which has been defined as "a less formal partnership" generally "entered into for a more limited business purpose and for a more limited time." *A.P. & Sons Const. v. Johnson*, 2003 SD 13, ¶ 13, 657 N.W.2d 292, 295 (citation omitted). Thus, informal joint ventures and even associations are recognized. They are merely:

FN11. UCC § 1-201(30), SDCL 57A-1-201(30), defines "person" as "an individual or an organization."

> ... a special combination of two or more persons, where in some specific venture a profit is jointly sought without the necessity of any actual partnership, corporate designation, or other

> business entity, or as an association of persons or legal entities to carry out a single business enterprise for profit....

*Ethan Dairy Prod. v. Austin*, 448 N.W.2d 226, 228 (S.D.1989) (citation omitted).

[¶ 23.] Considering these other business relationships, C & M Dairy fits within the FSA definition of "any other business ***10** entity." 7 USC § 1631(c)(10). Whether C & M Dairy's technical, legal status was an informal partnership, a joint venture, an association, or other business, it was transacting substantial business buying and selling cattle in South Dakota. In fact, one of the companion cases reflects that C & M Dairy often *purchased* cattle one day, and less than one week later, paid for the purchase by selling cattle at issue in these cases. Thus, the *purchases*, as well as the sales, were effectuated under the name "C & M Dairy." *See Fin-Ag, Inc. v. Pipestone Livestock Auction Market Inc.*, and *Fin-Ag, Inc. v. South Dakota Livestock Sales of Watertown Inc.*, 2008 SD 48, ¶ 8, 754 N.W.2d 29, 35-36. Under these facts, we are certainly not prepared to hold that absent formalistic creation, these types of informal business relationships have no meaning and do not exist.

[¶ 24.] This conclusion is supported by the nature and history of the business conducted under the name C & M Dairy. Calvin Berwald testified in his deposition that C & M Dairy was an old business name Berwalds used mostly for buying and selling cattle, and business was transacted under that name for about ten years. Arlen Berwald testified that C &

M Dairy was a business that Calvin and Michael conducted for the purchase and resale of cattle, and that C & M Dairy maintained bank accounts at Farmers State Bank and Dacotah Bank. In this case, there is no dispute that Berwalds used the name C & M Dairy to sell cattle to Cimpl's since 1995. C & M Dairy was the only name given to Cimpl's when the cattle were presented for sale and the only name placed on the proceeds checks. As Calvin Berwald confirmed in his deposition, C & M Dairy was "the only way those people know us."

[¶ 25.] Furthermore, although Calvin and Michael Berwald delivered most of the cattle to Cimpl's, this did not necessarily mean that they were delivering the cattle in their individual capacity. In every relevant instance, C & M Dairy was identified as the seller, and as far as Cimpl's knew, Calvin and Michael were delivering the cattle on behalf of their business identified by the d.b.a. C & M Dairy. Under these circumstances, the FSA did not require Cimpl's to ascertain the precise legal status of C & M Dairy at the time of sale. As previously noted, Congress specifically indicated that buyers often have no practical method for discovering the existence of an applicable security interest, and the FSA was intended to relieve the buyer of the obligation to diligently check public records to protect itself. *See supra* ¶¶ 13-15 (citing 7 USC § 1631(a)(1) and H.R. Rep. No. 99-271(I) at 110).

[¶ 26.] Fin-Ag, however, argues that C & M Dairy was a "nonexistent entity." To support this assertion, Fin-Ag relies on the deposition of Calvin Berwald, taken in a bankruptcy proceeding, stating that C &

M Dairy was no longer an entity. Fin-Ag also points out that C & M Dairy was not listed on any financial statements submitted to Fin-Ag, it was not on any income tax returns, and there were no UCC or fictitious name filings referencing C & M Dairy. Fin-Ag, however, concedes in its brief that C & M Dairy was listed as a d.b.a. in the bankruptcy. More importantly, in his deposition, Calvin Berwald indicated that C & M Dairy was the Berwalds' cattle business (although no longer used). Calvin Berwald testified: "C & M Dairy was our Clear Lake facility, which we used mostly for buying and selling cattle. I mean we used that-that deal for, I mean, I suppose ten years. There was a milk permit under there, too." Arlen Berwald explained that the use of C & M Dairy was terminated only after Fin-Ag told them ***11** they could not sell cattle through C & M Dairy.

[¶ 27.] Ultimately, the question is not the legal status of the business entity Berwald's were using to conduct their cattle business: the question is whether Berwald's business d.b.a. is a seller under the FSA. In support of its argument, Fin-Ag relies on authorities that primarily question whether a real person may be held liable for acts of a d.b.a.-not whether a d.b.a. may be recognized as a "seller" under the FSA. More importantly, Fin-Ag fails to recognize that even if one wishes to debate the legal entity status of transacting business under a d.b.a., the applicable rules for the South Dakota central filing system required Fin-Ag to have listed C & M Dairy as a separate name on its EFS. The South Dakota Administrative Rules implementing the FSA central filing system provide that the "use of doing business as is considered an additional debtor and

shall be listed as such with the elimination of the doing business as." ARSD 5:04:04:20(4) (discussing effect of amendment of financing statement to include new debtor). *See also* Chris Nelson, Secretary of State, *Filing Procedures Uniform Commercial Code* 7 (2003) (use of D/B/A, F/K/A, or A/K/A is considered an additional debtor and must be listed as such for accurate searches).[FN12] Accordingly, no matter what the precise legal status of the d.b.a. C & M Dairy, it was considered an additional debtor that required a separate listing for the purpose of giving notice under the FSA.

> FN12. This state provision is not in conflict with the FSA. 7 USC § 1631(c)(2)(C)(ii)(I) contemplates that the master listing of debtors may separately include "debtors doing business" under a different name. The FSA also requires state systems to be certified. 7 USC 1631(c)(2). The federal regulation implementing this provision, CFR § 205.103(b), provides states with the discretion to require additional information on an EFS.

[¶ 28.] Fin-Ag, however, urges this Court to adopt a "know your seller rule." The dissent agrees, arguing that "it would be relatively easy for the Sale Barn [or Buyer] to dig past the fictitious name and inquire as to the proper owner and seller of the cattle." *Infra* ¶ 70. In addition to providing no authority to support such a rule, were this Court to adopt it, Cimpl's (and similarly situated commission merchants) would become liable for such farm product sales even though they had no duty to determine from the public record the precise legal relationship among debtors like the Berwalds and C & M Dairy. The FSA specifically relieves buyers of any obligation to check public records other than the master list in order to avoid the perils of having failed to remit proceeds to

the secured party. H.R. Rep. No. 99-271(I) at 110; 7 USC § 1631(e). Furthermore, under the FSA, a buyer of farm products in this situation becomes subject to a security interest only if the *secured party* complies with the notice exception in 7 USC § 1631(c). 7 USC § 1631(d); *Ashburn Bank,* 426 S.E.2d at 65. Therefore, Cimpl's had no duty to investigate the legal status of C & M Dairy and resulting ownership of the cattle: it was Fin-Ag's duty to follow the Secretary of State's FSA regulations and list the d.b.a. "C & M Dairy" as an additional debtor. Ultimately, Fin-Ag and the dissent's "know your seller" rule would charge Cimpl's with imputed knowledge that Calvin and Michael Berwald were doing business as C & M Dairy and that they were the legal owners of the cattle. Imputing such knowledge, or requiring buyers to ascertain such knowledge under a "know your seller" rule, would disregard the explicit language of 7 USC § 1631(d), which provides that the buyer takes free of the security interest even if the buyer knows of the existence***12*** of such interest. Fin-Ag's proposed rule would also place the burden of the debtor's fraud on the buyer and effectively return South Dakota to pre-FSA law.[FN13]

FN13. Fin-Ag's proposed "know your seller rule" is contrary to Congressional intent "to shift the potential burden of loss in cases of the sale of farm products to the lenders who finance farm operations, rather than have that burden imposed upon buyers, thus inhibiting interstate commerce." *Lisco State Bank,* 752 F.Supp. at 334; *see also In re Julien Co.,* 141 B.R. 384, 388 (Bkrtcy.W.D.Tenn. 1992) ("In its abrogation of the 'farm products exception,' Congress intended to reallocate the loss from the buyer to the farm products lender when the borrower defaults") (citing *United*

*States v. Progressive Farmers Mktg. Agency*, 788 F.2d 1327, 1331 (8thCir.1986)).

[¶ 29.] For the foregoing reasons, this Court concludes that C & M Dairy qualified as a seller within the meaning of the FSA. And because C & M Dairy was the only seller identified in each sale, Fin-Ag's failure to include C & M Dairy on its EFS disqualified Fin-Ag from invoking the written notice exception to FSA protection under 7 USC § 1631(e)(3). Because the written notice exception did not eliminate Cimpl's' FSA protection, the next question is whether Cimpl's' FSA protection was eliminated by the "created by the seller" limitation in 7 USC § 1631(d).

## C.

### *When is a Seller Regarded to Have Created a Security Interest?*

[¶ 30.] This Court has not interpreted the "created by the seller" limitation in a similar d.b.a. situation. The Minnesota Supreme Court interpreted the limitation in a "fronting situation," where a farmer used separate and distinct real persons-his hired help and his children-to sell farm products subject to a security interest the farmer had created. *Hufnagle*, 720 N.W.2d at 584. The Minnesota Supreme Court concluded that the term "seller" should mean the same thing for the notice exception and for the created by the seller limitation. Therefore, it held that because the fronting children and hired help did not create the security interest, the buyer took subject to the security interest. *Id.* at 586.

[¶ 31.] The fronting situation in *Hufnagle,* however, is distinguishable from the d.b.a. situation for two reasons. First, the summary judgment record submitted in *Hufnagle* did "not fully explain the circumstance under which the [fronting parties] became involved with the sales to [the buyer]." *Id.* at 584. The Minnesota court acknowledged that it did not know the actual relationship between the owner and fronting parties, and the court assumed three potential scenarios. The fronting party was: (1) an agent selling on behalf of the owner as an undisclosed principal; (2) a commission merchant or selling agent; or (3) the owner of the farm product who was selling on his/her own behalf. *Id.* Although the court ultimately concluded that these three types of fronting persons could not be sellers of the debtor's property and simultaneous creators of the debtor's security interest, the *Hufnagle* court conceded its conclusion was based on the "factual scenarios possible *on this record....*" *Id. Hufnagle* did not, however, consider the fourth factual scenario that is before this Court, i.e., debtors who created the security interest, and conducted their business under their d.b.a. business name.

[¶ 32.] Unlike *Hufnagle,* Berwalds created the security interest, but did not transfer the collateral to a distinct, real person for a later sale. They utilized their d.b.a. to sell the cattle themselves. Therefore, for purposes of the created by the seller limitation, Berwalds cannot be separated from the acts of their d.b.a. C & M ***13** Dairy. *See Jaffe v. Nocera,* 493 A.2d 1003, 1008 (D.C.Ct.App.1985), providing, " '[t]he ordinary sense of the word's X,

d/b/a Y, Inc. should 'convey the message' that X remains personally liable for this entity's (Y's) obligations." (quoting *S. Ins. Co. v. Consumer Ins. Agency, Inc.*, 442 F.Supp. 30, 31 (E.D.La.1977)). This is far different than *Hufnagle* where separate and distinct sellers sold the collateral without having any business relationship or interest in the debtor's business. [FN14] *Hufnagle* specifically noted that collateral was sold "in the names of third persons not involved with the debt to [seller]." *Hufnagle*, 720 N.W.2d at 580.

FN14. The dissent is incorrect in stating that this opinion is inconsistent because it declares that C & M Dairy is an entity, "separate and distinct" from the Berwalds. *See infra* ¶ 62. On the contrary, this opinion is specific in noting that "unlike *Hufnagle*, Berwalds created the security interest but did not transfer the collateral to a distinct, real person for a later sale. They utilized their d.b.a. to sell the cattle themselves." *Supra* ¶ 32. It was *Hufnagle*, not this case, that involved separate and distinct entities selling farm products.

[¶ 33.] *Hufnagle* is further distinguished because it appeared to involve collusion on the part of the buyer. *Fin Ag, Inc. v. Hufnagle, Inc.*, 700 N.W.2d 510, 518 (Minn.Ct.App.2005). Although the Minnesota Supreme Court did not specifically rely on this fact, it did not reject the Minnesota Court of Appeal's analysis noting the extensive previous sales relationship between the owner of the cattle and the buyer, and the familial and employment relationships of the supposed "sellers" to the actual owner. *Id.* One such relationship involved sales by and proceeds checks payable to the owner's children, one of whom was only five years old at the time of sale. *Id.* Thus, *Hufnagle* involved a buyer that apparently knew of the lien and appeared to be a

participant in the scheme to defraud the creditor. In this case, Fin-Ag concedes there was no collusion, and Cimpl's neither knew of the lien nor was a participant in the scheme to defraud Fin-Ag.

[¶ 34.] More fundamentally, however, we disagree with *Hufnagle's* "created by the seller" legal analysis for two reasons. First, as previously noted, *Hufnagle* did not have an adequate factual record on summary judgment, *see supra* ¶ 31 citing *Hufnagle,* 720 N.W.2d at 584, and the court therefore assumed the fronting situation involved one of three scenarios. The only scenario that could be applicable here is the *Hufnagle* example of a sale by an undisclosed principal. In its analysis of this scenario, however, the Minnesota court incorrectly assumed that one who deals with the agent of an undisclosed principal has knowledge of the undisclosed principal's identity and, therefore, notice of an EFS under the undisclosed principal's name. The entire *Hufnagle* analysis is premised on this incorrect assumption:

> If we view [the owner of the collateral] as the seller, assuming that the [fronting party] sold the collateral as agents for [the owner] as an undisclosed principal, the exception in section 1631(e) for [notice of] a security interest as to which notice has been given would apply because [the buyer] received notice of [the lender's] interest against [the owner], and [the buyer] did not secure a waiver of the interest from [the lender].

720 N.W.2d at 586 (citing 7 USC § 1631(e)(3)). As is readily apparent, this analysis assumes that in this

scenario the buyer would have EFS notice of the lender's security interest because the buyer would have notice of the agent's undisclosed principal's name. However, by definition, one cannot have notice of the principal's name for purposes of notice when the agency relationship involves an *undisclosed*14* principal. The dissent makes the same mistake. *See infra* ¶ 62.

[¶ 35.] We also disagree with *Hufnagle* because its "created by the seller" analysis is premised on the observation that legislative intent does not support the notion that a seller could be considered differently, depending on the context in which it is used. *See Hufnagle,* 720 N.W.2d at 588-89. In our view, *Hufnagle* overlooked two instructive statements of Congressional intent. In the first, dealing with the reason for preempting all provisions of state law that prevented buyers in the ordinary course from taking free of agricultural lenders' security interests, Congress noted that innocent buyers of farm products should not ...

> become unwilling loan guarantors, in essence assuming the credit supervision responsibilities that rightly belong with the lender who is making the profit off the loan to begin with. [Especially where a]t the same time, farm product buyers have no control over the lender's practice, and receive no compensation in the form of interest to cover the risk exposure and jeopardy unknowingly and unwillingly assumed.

H.R. Rep. No. 99-271(I) at 109, U.S.Code Cong. & Admin.News 1985 at 1210. And in the second, with

respect to notice, Congress specifically intended to preempt state laws that require buyers to "check public records, obtain no-lien certificates from the farm products sellers, or otherwise seek out the lender and account to that lender for the sale proceeds." *Id.* at 110, U.S.Code Cong. & Admin.News 1985 at 1211.

[¶ 36.] In light of this express intent, for purposes of the notice exception, it is unreasonable to conclude that Congress intended to require a buyer like Cimpl's to determine the legal status of C & M Dairy or be subjected to constructive notice that Berwalds were legally the sellers. Cimpl's simply had no duty, other than to check the master list, to determine whether C & M Dairy was a seller on Fin-Ag's EFS. Likewise, with respect to the created by the seller limitation, we believe it is unreasonable to conclude Congress intended that buyers, acting in the ordinary course of business, would not be protected by the FSA from debtors who created a security interest in collateral and subsequently utilized their business d.b.a. in selling the collateral.

[¶ 37.] In addition to instructive Congressional intent, *Hufnagle* also failed to consider several cases that have considered the created by the seller limitation in factual contexts more akin to the d.b.a. seller in our case. Although these courts interpreted UCC § 9-307 (now UCC § 9-320), the cases are applicable because when the FSA was enacted, it adopted the UCC "created by the seller" language. *Hufnagle*, 720 N.W.2d at 585. Furthermore, FSA implementing regulations specifically recognize that court decisions involving UCC terms within the farm

products exception in Section 9-307(1), which are not defined in the FSA, are applicable in interpreting the FSA. 9 CFR § 205.211 (2006).

[¶ 38.] In one case that *Hufnagle* considered but rejected, the Eighth Circuit Court of Appeals concluded that a farmer, who sold farm products to an elevator that he also owned, was the seller who created the security interest even though the elevator was the immediate seller to the ultimate purchaser. *First Bank of N.D. (N.A.)-Jamestown v. Pillsbury Co.*, 801 F.2d 1036, 1038-40 (8thCir.1986). In considering the limitation, the court treated the security interest as being created by the elevator because the farmer, who actually created the security interest, was the owner of both the farming operation ***15** and the elevator. *Id.* at 1039-40. The Eighth Circuit Court of Appeals did so even where, unlike this case, the grain elevator was legitimately incorporated as a separate entity. *Id.* at n. 4. The court reasoned, " 'the relationship between the former owner [of the collateral] and the [immediate] seller may be such that the security interest created by the former owner may be regarded as having been created by the seller....' " *Id.* (quoting 9 *Anderson on the Uniform Commercial Code* § 9-307:8, at 194-95 (3d ed. 1981)) (alteration in original).

[¶ 39.] Both Iowa and Oklahoma have also declined to strictly construe the created by the seller limitation "where the creator of the prior lien and the immediate seller are separate but closely related entities, or the seller has been 'instrumental in creating the encumbrance and conflict.' " *C & J Leasing II Ltd. P'ship v. Swanson*, 439 N.W.2d 210,

213 (Iowa 1989) (quoting *Adams v. City Nat. Bank & Trust Co.*, 565 P.2d 26, 31 (Okla.1977) (per curiam)) (citing *G.M.A.C. v. Keil*, 176 N.W.2d 837, 841 (Iowa 1970)). Unlike *Hufnagle*, the Iowa Supreme Court reasoned that the buyer was entitled to prevail over the "remote" lienholder because, "the legislature did not intend [the created by the seller language] to give 'preference [in cases where] a lien's ... creator was not as shown on the records, but [was involved with] another party under a confidential transaction of which the ultimate purchaser had no knowledge.' " *Id.* (quoting *G.M.A.C.*, 176 N.W.2d at 841; *Adams*, 565 P.2d at 31). The Iowa Supreme Court explained: "where a[n owner] who is not a secured party has been instrumental in creating an encumbrance and the resulting priority conflict for an innocent buyer in ordinary course, courts must apply broadly the 'by [the] seller' language [ ] to effectuate the statute's protective purposes." *Id.* at 214.

[¶ 40.] The Oklahoma Supreme Court reached the same conclusion. It explained the situation in which the created by the seller limitation was actually intended by citing the "most widely cited decision involving a security interest not 'created by his seller.' " *Adams*, 565 P.2d at 30 (citing *National Shawmut Bank of Boston v. Jones*, 108 N.H. 386, 236 A.2d 484 (1967)). The Oklahoma court explained that the intended application only involves a security interest not created by the seller or by the seller's related party, but by an entirely separate third person who completed a bona fide sale of the collateral to the immediate seller. *Id.*[FN15]

FN15. Ironically, even *Hufnagle* acknowledged this restricted, appropriate use of the created by the seller limitation, citing the illustration used in the comment to UCC § 9-320 (formerly § 9-307):

> Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to the perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Buyer buys the equipment from Dealer. Even if Buyer qualifies as a buyer in the ordinary course of business, Buyer does not take free of Lender's security interest ... because Dealer did not create the security interest; Manufacturer did.

*Hufnagle, Inc.*, 720 N.W.2d at 585 (quoting UCC § 9-320, cmt. 3 (2000), 3 ULA 219-20 (2002)).

{¶ 41.] Finally, like the Iowa and Oklahoma Supreme Courts, an Arizona court of appeals concluded "that the protection [for buyers] in the ordinary course under section 9-307(1) may potentially extend to a buyer from a seller who acquired the collateral from a related entity that is liable as debtor under a security agreement." *Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 876 P.2d 1190, 1197 (1994). Although *Deutsche* did not ultimately extend buyer in the ***16** ordinary course protection, it recognized that an "invocation of the 'alter ego' or 'piercing the corporate veil' doctrine" may be utilized to disregard separate corporate existence, so the owners could be viewed as both the creators of the security interest and the sellers of the collateral. *Id.* The Arizona court noted, "the corporate fiction will be disregarded when the corporation is the alter ego or business conduit of a person, and when to observe the corporation would work an injustice." *Id.*

[¶ 42.] Ultimately, the created by the seller limitation "was generally designed to insure compliance by a retailer under an agreement with his inventory financer not to sell without financer's permission." *Adams*, 565 P.2d at 30. However, "[i]t is illogical to believe when the codal redactors drafted this limitation they anticipated a buyer would not be protected from misrepresentation by [a creator of a security interest] who had manipulated [the collateral] for his own benefit." *Id.* On the contrary, "[n]othing in the comments to Article 9 require the 'created by his seller' limitation to be an insurmountable barrier to good faith acquisition of pre-encumbered property from [a seller] who himself was instrumental in creating the encumbrance and conflict." *Id.* at 31.

[¶ 43.] Cimpl's case is even more persuasive than the foregoing authorities because, unlike those cases, Berwalds and C & M Dairy were not separate corporations. C & M Dairy was the d.b.a. for Calvin and Michael Berwald, and C & M Dairy was the name under which Berwalds conducted their cattle business. Legally, C & M Dairy was the Berwalds. Therefore, we need not pierce a corporate veil to conclude that C & M Dairy was the alter ego of Berwalds. Because C & M Dairy was the alter ego of the Berwalds, and because Berwalds created the security interest, C & M Dairy must be regarded as the seller who created the security interest.

[¶ 44.] We recognize that the Minnesota Supreme Court disagreed with the Eighth Circuit Court of Appeals analysis in *First Bank of N.D. (N.A.)-Jamestown*, and was unwilling to consider a "seller"

in two different ways. *Hufnagle* did so, however, relying on the premise that there was no "significant indication that this was the legislature's intent." *Hufnagle*, 720 N.W.2d at 588-89. This rationale overlooked compelling expressions of congressional intent. *See supra* ¶ 35. The *Hufnagle* analysis also failed to consider the two different contexts and purposes for which the term "seller" is used in the FSA. With respect to the notice exception, Congress clearly required the lender's strict compliance with the identification of the seller on the EFS, and South Dakota has implemented rules that require secured parties to list a d.b.a. as a separate debtor. With respect to the created by the seller limitation, *Hufnagle* overlooked important cases that have identified legislative intent that this type of limitation was not intended to protect the secured party when related parties create the encumbrance and sell the collateral.

[¶ 45.] The dissent follows the same path emphasizing that "[w]e certainly should not interpret seller two different ways, when many commentators have criticized the limitation 'created by the seller,' in the context of 9-307 [now 9-320 and the FSA], yet the clause has never been amended or eliminated since the UCC was rewritten in 1957." *Infra* ¶ 66 (citing *Hufnagle*, 720 N.W.2d at 585) (citing William H. Lawrence, *The " Created by His Seller" Limitation of Section 9-309(1) of the UCC: A Provision in Need of an Articulated Policy*, 60 Ind. L.J. 73, 73-74 (1984-85); Richard H. Nowka, ***17** *Section 9-302(a) of Reviewed Article 9 and The Buyer in the Ordinary Course of Pre-Encumbered Goods: Something Old and Something New*, 38 Brandeis L.J. 9, 23-24 (1999-

2000)). The dissent fails to recognize, however, that these commentators would not support the dissent's literal application of the created by the seller provision. On the contrary, Professor Lawrence criticizes opinions like the dissent, which apply the created by the buyer's seller provision "in a mechanical fashion without any attempt to address the policy considerations." Lawrence, *supra,* 73. He cautions that "[b]y [such] mechanical jurisprudence ... courts may satisfy their task of implementation ... but they must look beyond the mere words to the context of their adoption in order to construe the statute in ways that will achieve its legislative purpose." *Id.* at 75-76. He points out that the purpose of the limitation is twofold. The first is to protect buyers in the ordinary course who are involved in apparent authority sales established by: entrustment of the collateral to debtors; inventory financing; and by placing the debtor in possession of goods when the debtor is in the business of selling goods of the same kind. *Id.* at 81-82. When some or all of these factors are present, the secured party is deemed to have vested the debtor with indicia of apparent authority protecting the buyer from the security interest. *Id.* The second purpose arises from agency law: protection is afforded a buyer under principles of entrustment of possession of the collateral and under the principle that a buyer who reasonably believes that the seller is the owner should be protected, even if the owner is an undisclosed principal. *Id.* at 85-86. Finally, Professor Lawrence points out that as between an innocent buyer and an innocent secured party, the laws' allocation of risk identifies the secured party as the party most responsible for loss. *Id.* at 95-96. Although relying on Professor

Lawrence, the dissent fails to apply his analysis supporting protection of the buyer in this case. (Professor Nowka sets forth analogous purposes for the provision; Nowka, *supra,* 23-24)

[¶ 46.] Ultimately, we agree with the Eighth Circuit Court of Appeals, and the Iowa, Arizona, and Oklahoma state courts. These courts either:(1) hold that the created by the seller limitation does not apply; or (2) treat the immediate seller as the entity that created the security interest when the immediate seller and the remote grantor of the security interest are closely related and the remote grantor was instrumental in creating the conflict.

[¶ 47.] For the foregoing reasons we conclude that, as the alter ego of Berwalds, C & M Dairy should be regarded as the seller who created the security interest within the meaning of 7 USC § 1631(d). And, because C & M Dairy was the only seller identified at sale, but was not identified on the master list, Cimpl's did not have written notice of the security interest under 7 USC § 1631(e)(3). Consequently, Cimpl's was entitled to FSA protection. Accordingly, Cimpl's took the cattle sold by C & M Dairy free of Fin-Ag's security interest, and Cimpl's cannot be liable for conversion. Because we dispose of Fin-Ag's appeal on the FSA, we do not reach the parties' other issues.

## III.

*Disbursements*

[¶ 48.] Following the favorable judgment, Cimpl's sought the taxation of disbursements for copying costs of $1,256.17. The majority of the copying costs ($941.57) were for copying the "Berwald Loan File" maintained by Fin-Ag. Fin-Ag argues that these copies were not "necessarily incurred in gathering and procuring evidence or bringing the matter to trial." SDCL 15-17-37. In support of **18* this argument, Fin-Ag points out that only fifty pages of the 5,520 pages copied were actually used by Cimpl's to support its motion for summary judgment. Therefore, Fin-Ag maintains that Cimpl's is only entitled to recover disbursements for those fifty pages.

[¶ 49.] "We review an award of disbursements under an abuse of discretion standard." *Behrens v. Wedmore*, 2005 SD 79, ¶ 69, 698 N.W.2d 555. "When applying this standard, we do not inquire whether we would have made the same decision. Instead, we decide only whether the circuit court could reasonably reach the conclusion it did in view of the applicable law and the circumstances of the case." *Maxner v. Maxner*, 2007 SD 30, ¶ 12, 730 N.W.2d 619, 622. This Court has recognized that the trial court is in the best position to determine whether the number of copies is reasonable. *Zahn v. Musick*, 2000 SD 26, ¶ 51, 605 N.W.2d 823, 833.

[¶ 50.] Notably, SDCL 15-17-37 does not limit expenditures to those actually utilized at trial or filed with a motion. It also permits recovery for "gathering and procuring evidence or bringing the matter to trial." In this case, the record reflects that Cimpl's initially requested production of all

documents in Fin-Ag's possession concerning loans made to Berwalds. Fin-Ag made the records available for inspection and review at its counsel's office. Fin-Ag also allowed Cimpl's to make the determination at that time as to what it wanted copied. After reviewing the files for a substantial period of time, Cimpl's requested that Fin-Ag copy the entire loan file. Fin-Ag complied with that request. It appears that there were numerous documents in the loan file, and it was not known at that time what specific loan documents would become relevant in bringing the matter to trial.

[¶ 51.] After considering Cimpl's affidavit and Fin-Ag's objection, the circuit court granted Cimpl's disbursements. Considering the nature and complexity of these commercial transactions, Fin-Ag has not shown that this decision was an abuse of discretion.

[¶ 52.] Affirmed.

[¶ 53.] GILBERTSON, Chief Justice, and MEIERHENRY, Justice, concur.

[¶ 54.] SABERS and KONENKAMP, Justices, dissent.

SABERS, Justice (dissenting on all Fin-Ag cases on the FSA issue).

[¶ 55.] Incredibly, Fin-Ag presents this Court with authority from a neighboring state that is virtually on point to the circumstances of this case; yet, the

opinion goes out of its way at every opportunity in its analysis of the issues to arrive at the opposite conclusion of the *Hufnagle* case. Because I cannot agree with the opinion's analysis and conclusions regarding FSA protection, I dissent.

[¶ 56.] In *Hufnagle,* the lender, Fin-Ag had a perfected security interest in Buck's corn crops. 720 N.W.2d 579, 580 (Minn.2006). Fin-Ag also filed an effective financing statement, "which caused the interest to be listed in Minnesota's central filing system." *Id.* Meschke was a registered farm products dealer and he received the central filing system's list of sellers whose grain was encumbered by security interests. *Id.* When Meschke bought corn directly from Buck he, with two exceptions, made the checks payable to Buck and Fin-Ag jointly. *Id.*

[¶ 57.] Later, Meschke bought corn from persons, the Tookers, who claimed they were the sellers. *Id.* at 583-84. There was no one by the name Tooker on the central filing system list. Meschke bought corn from the Tookers seven different**19* times. The proceeds from these seven transactions were deposited in the debtor's (Buck's) account. *Id.* Fin-Ag was not made a co-payee on any of these checks. *Id.*

[¶ 58.] Fin-Ag sued Meschke for conversion after Buck failed to repay Fin-Ag. *Id.* The Minnesota district court granted summary judgment in favor of Fin-Ag. *Id.* On appeal, the Minnesota Court of Appeals affirmed. *Id.*

[¶ 59.] The Minnesota Supreme Court held Meschke was liable for conversion. *Id.* at 581. In doing so, it

noted that it must determine "how section 1631 works in the situation of 'fronting' sales. The parties describe 'fronting' as being where a seller of farm products that are subject to a security interest has a third party sell them under the third party's name." *Id.* at 584. The court recognized that "both Meschke and Fin-Ag can be viewed as innocent parties in the sense that they each did everything they were required or expected to do under the FSA." *Id.*

[¶ 60.] The buyer, Meschke, made arguments that are similar to the Sale Barns' arguments in this case.[FN16] For instance, Meschke argued that it is difficult for a buyer of farm products to discover a security interest in a fronting situation and lenders are better suited to police these situations. Sale Barns advanced a virtually identical argument.

> FN16. While Cimpl's is not a sale barn or commission merchant, the FSA treats it the same, and the references to Sale Barn include Cimpl's.

[¶ 61.] Despite this argument, and the recognition of the difficulty a fronting situation presents for a buyer, the Minnesota Supreme Court found it was "constrained to apply the plain language of the statutes, as enacted by Congress and the Minnesota Legislature, and to follow where they lead." *Id.* at 585. The court noted that the "created by the seller" language was a serious limitation on the FSA's protections afforded to the buyer. Moreover, the language has come under much criticism, but Congress "essentially incorporated this clause in section 1631 when it attempted to correct some of the

other shortcomings, from the perspective of buyers, of UCC section 9-307." *Id.*

[¶ 62.] Due to this limitation, Meschke could not find protection, even in the fronting situation and even though he was an innocent buyer. The court noted:

> The inclusion of the "created by the seller" clause in section 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties. *Under the facts of this case, no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest.* This is because ***if we view Buck as the seller,*** we must conclude that *Meschke's rights are subject to Fin Ag's security interest* under section 1631 because Fin Ag filed an "effective financing statement" that put Meschke on notice of Fin Ag's security interest in Buck's products. And, ***if we view the Tookers as the sellers,*** we must conclude *that Meschke's rights are subject to Fin Ag's security interest,* under either section 1631 or Minnesota's UCC, *because both statutes only protect a buyer from a security interest created by the seller and not from a security interest created by an undisclosed owner,* which continues in the product despite the sale.

*Id.* at 586 (emphasis added). Here, the same result is required, if we view Calvin and Michael Berwald as the seller, then ****20*** Sale Barns' rights are "subject to Fin-Ag's security interest under section 1631 because

Fin-Ag filed an 'effective financing statement' that put [Sale Barns] on notice...." *Id.* Alternatively, if we view C & M Dairy as the seller, then "we *must* conclude that [Sale Barns]' rights are subject to Fin-Ag's security interest" because under section 1631, a buyer is only protected "from a security interest created by the seller and not from a security interest created by an undisclosed owner." *See id.*

[¶ 63.] Instead, the opinion distinguishes *Hufnagle* by declaring "fronting" different than using a d.b.a.[FN17] It rationalizes that the *Hufnagle* court did not "consider the fourth factual scenario that is before this Court, i.e., debtors, who created the security interest, and conducted their business under their d.b.a. business name." *See supra* ¶ 31. However, when discussing if C & M Dairy can be a seller under the FSA, the opinion declares that C & M Dairy is an "other business entity," separate and distinct from the Berwalds. *See supra* ¶ 23 (quoting 7 USC § 1631(c)(10)). The use of a separate and distinct entity to sell cattle subject to a different owner's security interest is factually analogous to *Hufnagle,* and *is* fronting. As the Minnesota Supreme Court noted, "[t]he corn [cattle] had been sold to Meschke [Sale Barns] in the names of third persons [separate entity, C & M Dairy] not involved with the debt to Fin-Ag." *Hufnagle,* 720 N.W.2d at 580. This issue should be decided based on the rationale expressed in *Hufnagle.*

FN17. The opinion attempts to distinguish the *Hufnagle* case by explaining a fronting situation only occurs when a separate third person sells the product. However, what about the deliveries where Austin, Arlen, a semi-driver or some other unidentified person delivered cattle to the sale

> barns? Are these not third persons? Or are we to consider anyone who delivers cattle for C[alvin] & M[ichael] Dairy a part of that fictitious entity?

[¶ 64.] The opinion can call it anything it wants, but it cannot hide what is plain and obvious. In its attempts to decide this case in favor of the Sale Barns, it arrives at some conflicting conclusions. For example, the opinion concludes that C & M Dairy is a "business entity" and therefore separate from Calvin and Michael Berwald and can be a seller under the statute, thus the FSA protects Sale Barns. Then, in the next portion of analysis, C & M Dairy is merely a d.b.a. and cannot be separated from the Berwalds, therefore C & M Dairy created the security interest and again, Sale Barns win. In reality, C & M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego-and certainly not both the "seller" and the "seller who created the security interest."

[¶ 65.] There are two different interpretations of a supposed entity, yet the same strained outcome. When defining "seller," it is inconsistent to say that in one instance C & M Dairy is an entity distinct from the Berwalds, so C & M Dairy can be the seller and claim Sale Barns did not receive notice of Fin-Ag's security interest, and then to say the Berwalds and C & M Dairy are "one and the same" in order to find C & M Dairy is the "seller who created the security interest." In *Hufnagle*, the Minnesota Supreme Court specifically refused to "define seller two different ways in the same analysis without a significant indication that this was the legislature's intent. No such indication [of legislative intent]

exists here." 720 N.W.2d at 588-89. We should not interpret seller two different ways.

[¶ 66.] We certainly should not interpret seller two different ways when many commentators have criticized the limitation "created by the seller" in the context ***21** of 9-307, yet the clause has never been amended or eliminated since the UCC was rewritten in 1957. *Hufnagle*, 720 N.W.2d at 585 (citing William H. Lawrence, *The "Created by His Seller" Limitation of Section 9-309(1) of the UCC: A Provision in Need of an Articulated Policy*, 60 Ind. L.J. 73, 73-74 (1984-1985) and Richard H. Nowka, *Section 9-302(a) of Reviewed Article 9 and The Buyer in the Ordinary Course of Pre-Encumbered Goods: Something Old and Something New*, 38 Brandeis L.J. 9, 23-24 (1999-2000)). Significantly, despite its criticisms, Congress included this clause in section 1631 of the FSA in 1985 when attempting to correct some of the other problems of buying food products under the UCC. *See* supra ¶ 61 (Sabers, J., dissenting) (citing *Hufnagle*, 720 N.W.2d at 585).

[¶ 67.] White and Summers have discussed the difficulties with the "created by the seller" language. *See* 4 White & Summers, Uniform Commercial Code § 33-13 (4th ed 1995 & Supp. 2007) (discussing the problems produced by the created by the seller language in former UCC § 9-307). Importantly, they theorize that: "Perhaps the drafters intended that as between two innocent parties the ultimate loss should fall on the party who dealt most closely with the 'bad guy.' " *Id.* Although this may conflict with the FSA policy, we have to presume that Congress

knew what it was doing when it borrowed this language from the UCC.

[¶ 68.] In each of the cases here,[FN18] the Sale Barns knew they were dealing with Calvin or Michael Berwald, or both, before they were dealing with "C & M Dairy." Calvin Berwald is the "C" and Michael Berwald is the "M" and the Sale Barns knew it, and they should suffer the ultimate loss. The Sale Barns either took a "head in the sand" approach and let the Berwalds tell them who they were acting as, or they simply decided that even though Berwald and family were listed in the master list, if the Berwalds chose to call themselves something else not mentioned on the list, the Sale Barns took the position they had to go strictly with the list.[FN19] In the *Watertown Livestock* case (2008 SD 49, 754 N.W.2d 23), the decision to go with C & M Dairy as the seller was self-serving, as it allowed the sale barn to collect on a past debt. *See Fin-Ag v. Watertown Livestock*, Brief of Appellee at 4, 2008 SD 49, 754 N.W.2d 23. In sum, these Sale Barns were more closely dealing with the "bad guy."[FN20]

FN18. Cimpl's may not have known C & M Dairy as Michael and Calvin Berwald specifically; however the deliveries were made by Austin, Calvin, Michael, or Arlen Berwald. The other sale barns had received deliveries of cattle from Michael and Calvin Berwald in the past as well.

FN19. Either way, when compared to *Hufnagle*, these facts make it a much stronger case for Fin-Ag to prevail because in *Hufnagle*, the buyer was not dealing with the owner/debtor, Buck, but was dealing with completely unrelated sellers, the Tookers. Here, Sale Barns dealt solely with the Berwalds simply using an unregistered, fictitious name. The Sale Barns knew they were dealing with the

Berwalds fronting as C & M Dairy. Once again, it is not rocket science that the "C" in C & M Dairy stands for Calvin Berwald, and the "M" in C & M Dairy stands for Michael Berwald, especially when they or their father, Arlen Berwald, delivered the cattle.

FN20. Under South Dakota Law, it is not only a crime to sell mortgaged property without the mortgagee's consent, *see* SDCL 44-1-12, it is also a crime under SDCL 37-11-1, for any person to engage in or conduct a business for profit in South Dakota "under any name which does not plainly show the *true surname* of each person interested in such business unless a statement is filed first." (Emphasis added). Furthermore, South Dakota has had a fictitious name certificate statute for at least sixty-nine years. The fictitious name certificate must be filed in the register of deeds office or secretary of state's office. Penalties are provided for failure to file and it constitutes a misdemeanor.Although these issues were not raised in the briefs, the Sale Barns are "presumed to know the law" and should not benefit from two separate violations of the criminal law.

**22* [¶ 69.] It does not end there. Again, in an attempt to distinguish *Hufnagle*, the opinion indicates that *Hufnagle* "appeared to involve collusion on the part of the buyer." *See supra* ¶ 33. Never mind the fact that the Supreme Court of Minnesota did not rely on that specific fact in its analysis and it is not relevant to the discussion. It merely seeks to cloud the real issues. Indeed, the court noted that "no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest." *Id.* at 586.

[¶ 70.] The opinion's analysis of this issue sends the message to deceitful debtors that they can avoid the security interest if they use their initials as a

fictitious name to sell their collateral to sale barns. The opinion blindly accepts the answer of the driver of the cattle truck to the yardman that the seller is "C & M Dairy," even if the driver of the truck is Calvin Berwald, Michael Berwald or their Father, Arlen Berwald. Interpreting the statutes in this manner produces the exact result we should prohibit-absurd. The opinion claims the burden should be on the lender, the party who is more capable of policing this problem. However, it seems it would be next to impossible for a lender to prevent its debtor from creating a fictitious name, with no fictitious name filing, and selling cattle under that name, while it would be relatively easy for the Sale Barn to dig past the fictitious name and inquire as to the proper owner and seller of the cattle.

[¶ 71.] Finally, the opinion thoroughly discusses the background of the enactment of the FSA. It details the overarching theme of protecting buyers from the threat of double payment. Then, the opinion finds the statute ambiguous, because seller is not defined, and declares that we must use the policy behind the act to interpret the statute. *See supra* ¶ 20. Thus, according to the opinion, we must interpret the statute to favor the Sale Barns.

[¶ 72.] However, failure to define a term does not automatically result in an ambiguity. *Jackson v. Canyon Place Homeowner's Ass'n*, 2007 SD 37, ¶ 11, 731 N.W.2d 210, 213 (citing *Halls v. White*, 2006 SD 47, ¶ 8, 715 N.W.2d 577, 581). Moreover, we consistently only use the plain language of the statute and never examine the policy or legislative history unless the text is ambiguous. "Resorting to

legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable. Absent these circumstances, we must give legislation its plain meaning. We cannot amend [the statute] to produce or avoid a particular result." *In re Estate of Howe*, 2004 SD 118, ¶ 41, 689 N.W.2d 22, 32 (quoting *Slama v. Landmann Jungman Hosp.*, 2002 SD 151, ¶ 7, 654 N.W.2d 826, 828 (quoting *Petition of Famous Brands, Inc.*, 347 N.W.2d 882, 885 (S.D.1984))); *see also In re Estate of Olson*, 2008 SD 4, ¶ 38, 744 N.W.2d 555, 566; *Jensen v. Turner County Bd. of Adjustment*, 2007 SD 28, ¶ 5, 730 N.W.2d 411, 413; *Goetz v. State*, 2001 SD 138, ¶ 16, 636 N.W.2d 675, 681; *Reider v. Schmidt*, 2000 SD 118, ¶ 9, 616 N.W.2d 476, 479. As Judge Timm noted in the companion cases, "[t]he FSA is not ambiguous, and the seller using a different name does not create an ambiguity in the language of the statute." We should interpret seller consistently. If interpreted consistently and using the plain language ***23** of the statute, the Sale Barns are not protected by the FSA. It takes an owner or someone with interest in the property to create a security interest. If Congress meant a fiction or a front instead of the word seller, it would have said so.

[¶ 73.] There is a scarcity of authority on this issue. We should refuse to engage in statutory interpretation that so heavily favors the Sale Barns to a lender's disadvantage without a clear directive from Congress to do so. The rationale and holding set forth in *Hufnagle* should be the law of South Dakota.

In summary:

*Cimpl's (# 24172)*-

1. I would reverse Judge Rusch on the FSA seller issue for the reasons stated in my writing.
2. I would remand all other issues not reached by Judge Rusch for determination of genuine issues of material fact.

3. I would reverse the Order for Disbursements because Cimpl's should not win this lawsuit at this point.

[¶ 74.] KONENKAMP, Justice, joins this dissent.

S.D.,2008.
Fin-Ag, Inc. v. Cimpl's, Inc.
754 N.W.2d 1, 2008 SD 47

Supreme Court of South Dakota.
FIN-AG, INC., Plaintiff and Appellee,
v.
WATERTOWN LIVESTOCK AUCTION, INC.,
Defendant and Appellant.
and
Dacotah Bank, Defendant.
No. 24050.
Argued Jan. 8, 2007.
Decided June 18, 2008.

ZINTER, Justice.

[¶ 1.] This appeal arises from an action for conversion by Fin-Ag, Inc. against Watertown Livestock Auction, Inc. Fin-Ag alleges it had a perfected security interest in cattle sold at Watertown under the name C & M Dairy. The case involves numerous issues regarding a commission merchant's liability for conversion when the collateral involves farm products covered by the Food Security Act (FSA), 7 USC § 1631 (1985). On cross-motions for summary judgment, the circuit court concluded that Watertown converted Fin-Ag's collateral.

[¶ 2.] This case involves the same debtors[FN1] and creditor, and the same type of ***24** cattle sales considered in *Fin-Ag, Inc. v. Cimpl's, Inc.*, 2008 SD 47, 754 N.W.2d 1; *Fin-Ag, Inc. v. Pipestone Livestock Auction Market, Inc.*, and *Fin-Ag, Inc. v. South Dakota Livestock Sales of Watertown, Inc.*, 2008 SD 48, 754 N.W.2d 29. In fact, the circuit court's memorandum decision in *Fin-Ag, Inc. v. South Dakota Livestock Sales of Watertown* was the basis

for the circuit court's decision in this case. Because we considered the same core issues[FN2] involving virtually identical transactions in the prior cases, we reverse and remand this case for further proceedings in accordance with those decisions.

FN1. Berwalds includes the following persons and entities: Calvin Berwald, Michael Berwald, Kimberly Berwald, Berwald Brothers (a general partnership including Calvin and Michael Berwald as general partners), and Sokota Dairy, LLC.

FN2. Watertown Livestock raises one additional argument under the Packers and Stockyards Act, 7 USC § 181, attempting to distinguish *Consolidated Nutrition, L.C. v. IBP, Inc.*, 2003 SD 107, 669 N.W.2d 126. We decline to review that argument because it was not presented to the circuit court.

[¶ 3.] GILBERTSON, Chief Justice, and MEIERHENRY, Justice concur.

[¶ 4.] SABERS and KONENKAMP, Justices, dissent in part and concur in part.

SABERS, Justice (dissenting on all Fin-Ag cases on the FSA issue).[FN3]

FN3. As the opinion acknowledges, this case is similar to *Fin-Ag, Inc. v. Cimpl's, Inc.*, 2008 SD 47, 754 N.W.2d 1 and *Fin-Ag, Inc. v. Pipestone Livestock Auction Market, Inc.*, and *Fin-Ag, Inc. v. South Dakota Livestock Sales of Watertown, Inc.*, 2008 SD 48, 754 N.W.2d 29. Because these cases are closely related and should be read together, it necessitates that I restate the underlying flaw in the FSA analysis stated in *Cimpl's*, 2008 SD 47, ¶¶ 10-47, 754 N.W.2d 1, 2008 WL 2469183, and perpetuated here.

[¶ 5.] Incredibly, Fin-Ag presents this Court with authority from a neighboring state that is virtually on point to the circumstances of this case; yet, the opinion goes out of its way at every opportunity in its analysis of the issues to arrive at the opposite conclusion of the *Hufnagle* case. Because I cannot agree with the opinion's analysis and conclusions regarding FSA protection, I dissent.

[¶ 6.] In *Hufnagle*, the lender, Fin-Ag had a perfected security interest in Buck's corn crops. 720 N.W.2d 579, 580 (Minn.2006). Fin-Ag also filed an effective financing statement, "which caused the interest to be listed in Minnesota's central filing system." *Id.* Meschke was a registered farm products dealer and he received the central filing system's list of sellers whose grain was encumbered by security interests. *Id.* When Meschke bought corn directly from Buck he, with two exceptions, made the checks payable to Buck and Fin-Ag jointly. *Id.*

[¶ 7.] Later, Meschke bought corn from persons, the Tookers, who claimed they were the sellers. *Id.* at 583-84. There was no one by the name Tooker on the central filing system list. *Id.* Meschke bought corn from the Tookers seven different times. *Id.* The proceeds from these seven transactions were deposited in the debtor's (Buck's) account. *Id.* Fin-Ag was not made a co-payee on any of these checks. *Id.*

[¶ 8.] Fin-Ag sued Meschke for conversion after Buck failed to repay Fin-Ag. *Id.* The Minnesota district court granted summary judgment in favor of

Fin-Ag. *Id.* On appeal, the Minnesota Court of Appeals affirmed. *Id.*

[¶ 9.] The Minnesota Supreme Court held Meschke was liable for conversion. *Id.* at 581. In doing so, it noted that it must determine "how section 1631 works in the situation of 'fronting' sales. The parties describe 'fronting' as being where a seller of farm products that are subject to a security interest has a third party sell ***25** them under the third party's name." *Id.* at 584. The court recognized that "both Meschke and Fin-Ag can be viewed as innocent parties in the sense that they each did everything they were required or expected to do under the FSA." *Id.*

[¶ 10.] The buyer, Meschke, made arguments that are similar to the Sale Barns' arguments in this case. For instance, Meschke argued that it is difficult for a buyer of farm products to discover a security interest in a fronting situation and lenders are better suited to police these situations. Sale Barns advanced a virtually identical argument.

[¶ 11.] Despite this argument, and the recognition of the difficulty a fronting situation presents for a buyer, the Minnesota Supreme Court found it was "constrained to apply the plain language of the statutes, as enacted by Congress and the Minnesota Legislature, and to follow where they lead." *Id.* at 585. The court noted that the "created by the seller" language was a serious limitation on the FSA's protections afforded to the buyer. Moreover, the language has come under much criticism, but Congress "essentially incorporated this clause in

section 1631 when it attempted to correct some of the other shortcomings, from the perspective of buyers, of UCC section 9-307." *Id.*

[¶ 12.] Due to this limitation, Meschke could not find protection, even in the fronting situation and even though he was an innocent buyer. The court noted:

> The inclusion of the "created by the seller" clause in section 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties. *Under the facts of this case, no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest.* This is because ***if we view Buck as the seller,*** we must conclude that *Meschke's rights are subject to Fin Ag's security interest* under section 1631 because Fin Ag filed an "effective financing statement" that put Meschke on notice of Fin Ag's security interest in Buck's products. And, ***if we view the Tookers as the sellers,*** we must conclude *that Meschke's rights are subject to Fin Ag's security interest,* under either section 1631 or Minnesota's UCC, *because both statutes only protect a buyer from a security interest created by the seller and not from a security interest created by an undisclosed owner,* which continues in the product despite the sale.

*Id.* at 586 (emphasis added). Here, the same result is required, if we view Calvin and Michael Berwald

as the seller, then Sale Barns' rights are "subject to Fin-Ag's security interest under section 1631 because Fin-Ag filed an 'effective financing statement' that put [Sale Barns] on notice...." *Id.* Alternatively, if we view C & M Dairy as the seller, then "we *must* conclude that [Sale Barns]' rights are subject to Fin-Ag's security interest" because under section 1631, a buyer is only protected "from a security interest created by the seller and not from a security interest created by an undisclosed owner." *See id.*

[¶ 13.] Instead, the opinion distinguishes *Hufnagle* by declaring "fronting" different than using a d.b.a.[FN4] It rationalizes that the *Hufnagle* court did not "consider the fourth factual scenario that is before this Court, i.e., debtors who created the security interest, and conducted their business under their d.b.a. business name." ***26** *See Fin-Ag v. Cimpl's*, 2008 SD 47, ¶ 31, 754 N.W.2d 1. However, when discussing if C & M Dairy can be a seller under the FSA, the opinion declares that C & M Dairy is an "other business entity," separate and distinct from the Berwalds. *Id.* ¶ 23 (quoting 7 USC § 1631(c)(10)). The use of a separate and distinct entity to sell cattle subject to a different owner's security interest is factually analogous to *Hufnagle*, and *is* fronting. As the Minnesota Supreme Court noted, "[t]he corn [cattle] had been sold to Meschke [Sale Barns] in the names of third persons [separate entity, C & M Dairy] not involved with the debt to Fin-Ag." *Hufnagle*, 720 N.W.2d at 580. This issue should be decided based on the rationale expressed in *Hufnagle*.

FN4. The opinion attempts to distinguish the *Hufnagle* case by explaining a fronting situation only occurs when a separate third person sells the product. However, what about the deliveries where Austin, Arlen, a semi-driver or some other unidentified person delivered cattle to the sale barns? Are these not third persons? Or are we to consider anyone who delivers cattle for C[alvin] & M[ichael] Dairy a part of that fictitious entity?

[¶ 14.] The opinion can call it anything it wants, but it cannot hide what is plain and obvious. In its attempts to decide this case in favor of the Sale Barns, it arrives at some conflicting conclusions. For example, the opinion concludes that C & M Dairy is a "business entity" and therefore separate from Calvin and Michael Berwald and can be a seller under the statute, thus the FSA protects Sale Barns. Then, in the next portion of analysis, C & M Dairy is merely a d.b.a. and cannot be separated from the Berwalds, therefore C & M Dairy created the security interest and again, Sale Barns win. In reality, C & M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego-and certainly not both the "seller" and the "seller who created the security interest."

[¶ 15.] There are two different interpretations of a supposed entity, yet the same strained outcome. When defining "seller," it is inconsistent to say that in one instance C & M Dairy is an entity distinct from the Berwalds, so C & M Dairy can be the seller and claim Sale Barns did not receive notice of Fin-Ag's security interest, and then to say the Berwalds and C & M Dairy are "one and the same" in order to find C & M Dairy is the "seller who created the security interest." In *Hufnagle*, the Minnesota

Supreme Court specifically refused to "define seller two different ways in the same analysis without a significant indication that this was the legislature's intent. No such indication [of legislative intent] exists here." 720 N.W.2d at 588-89. We should not interpret seller two different ways.

[¶ 16.] We certainly should not interpret seller two different ways when many commentators have criticized the limitation "created by the seller" in the context of 9-307, yet the clause has never been amended or eliminated since the UCC was rewritten in 1957. *Hufnagle,* 720 N.W.2d at 585 (citing William H. Lawrence, *The " Created by His Seller" Limitation of Section 9-309(1) of the UCC: A Provision in Need of an Articulated Policy,* 60 Ind. L.J. 73, 73-74 (1984-1985) and Richard H. Nowka, *Section 9-302(a) of Reviewed Article 9 and The Buyer in the Ordinary Course of Pre-Encumbered Goods: Something Old and Something New,* 38 Brandeis L.J. 9, 23-24 (1999-2000)). Significantly, despite its criticisms, Congress included this clause in section 1631 of the FSA in 1985 when attempting to correct some of the other problems of buying food products under the UCC. *See supra* ¶ 11 (Sabers, J., dissenting) (citing *Hufnagle,* 720 N.W.2d at 585).

[¶ 17.] White and Summers have discussed the difficulties with the "created by the seller" language. *See* 4 White & Summers, Uniform Commercial Code § 33-13 (4th ed. 1995 & Supp. 2007) (discussing the problems produced by the created by the ***27** seller language in former UCC § 9-307). Importantly, they theorize that: "Perhaps the drafters intended that as between two innocent parties the ultimate loss

should fall on the party who dealt most closely with the 'bad guy.' " *Id.* Although this may conflict with the FSA policy, we have to presume that Congress knew what it was doing when it borrowed this language from the UCC.

[¶ 18.] In each of the cases here,[FN5] the Sale Barns knew they were dealing with Calvin or Michael Berwald, or both, before they were dealing with "C & M Dairy." Calvin Berwald is the "C" and Michael Berwald is the "M" and the Sale Barns knew it, and they should suffer the ultimate loss. The Sale Barns either took a "head in the sand" approach and let the Berwalds tell them who they were acting as, or they simply decided that even though Berwald and family were listed in the master list, if the Berwalds chose to call themselves something else not mentioned on the list, the Sale Barns took the position they had to go strictly with the list.[FN6] In this case, the decision to go with C & M Dairy as the seller was self-serving, as it allowed the sale barn to collect on a past debt. *See Fin-Ag v. Watertown Livestock,* Brief of Appellee at 4, 2008 SD 49, 754 N.W.2d 23 (No. 24050). In sum, these Sale Barns were more closely dealing with the "bad guy."[FN7]

FN5. Cimpl's may not have known C & M Dairy as Michael and Calvin Berwald specifically; however the deliveries were made by Austin, Calvin, Michael, or Arlen Berwald. The other sale barns had received deliveries of cattle from Michael and Calvin Berwald in the past as well.

FN6. Either way, when compared to *Hufnagle,* these facts make it a much stronger case for Fin-Ag to prevail because in *Hufnagle,* the buyer was not dealing with the owner/debtor, Buck, but was dealing with completely

unrelated sellers, the Tookers. Here, Sale Barns dealt solely with the Berwalds simply using an unregistered, fictitious name. The Sale Barns knew they were dealing with the Berwalds fronting as C & M Dairy. Once again, it is not rocket science that the "C" in C & M Dairy stands for Calvin Berwald, and the "M" in C & M Dairy stands for Michael Berwald, especially when they or their father, Arlen Berwald, delivered the cattle.

FN7. Under South Dakota Law, it is not only a crime to sell mortgaged property without the mortgagee's consent, *see* SDCL 44-1-12, it is also a crime under SDCL 37-11-1, for any person to engage in or conduct a business for profit in South Dakota "under any name which does not plainly show the *true surname* of each person interested in such business unless a statement is filed first." (Emphasis added). Furthermore, South Dakota has had a fictitious name certificate statute for at least sixty-nine years. The fictitious name certificate must be filed in the register of deeds office or secretary of state's office. Penalties are provided for failure to file and it constitutes a misdemeanor.

Although these issues were not raised in the briefs, the Sale Barns are "presumed to know the law" and should not benefit from two separate violations of the criminal law.

[¶ 19.] It does not end there. Again, in an attempt to distinguish *Hufnagle,* the opinion indicates that *Hufnagle* "appeared to involve collusion on the part of the buyer." *Cimpl's,* 2008 SD 47, ¶ 33, 754 N.W.2d 1. Never mind the fact that the Supreme Court of Minnesota did not rely on that specific fact in its analysis and it is not relevant to the discussion. It merely seeks to cloud the real issues. Indeed, the court noted that "no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest." *Hufnagle*, 720 N.W.2d at 585-86.

[¶ 20.] The opinion's analysis of this issue in *Cimpl's*, 2008 SD 47, ¶¶ 10-47, 754 N.W.2d 1, incorporated by reference here, *see supra* ¶ 2, sends the message to deceitful debtors that they can ***28** avoid the security interest if they use their initials as a fictitious name to sell their collateral to sale barns. That opinion blindly accepts the answer of the driver of the cattle truck to the yardman that the seller is "C & M Dairy," even if the driver of the truck is Calvin Berwald, Michael Berwald or their Father, Arlen Berwald. Interpreting the statutes in this manner produces the exact result we should prohibit-absurd. That opinion claims the burden should be on the lender, the party who is more capable of policing this problem. However, it seems it would be next to impossible for a lender to prevent its debtor from creating a fictitious name, with no fictitious name filing, and selling cattle under that name, while it would be relatively easy for the Sale Barn to dig past the fictitious name and inquire as to the proper owner and seller of the cattle.

[¶ 21.] Finally, the opinion in *Cimpl's*, 2008 SD 47, 754 N.W.2d 1, thoroughly discusses the background of the enactment of the FSA. It details the overarching theme of protecting buyers from the threat of double payment. Then, that opinion finds the statute ambiguous, because seller is not defined, and declares that we must use the policy behind the act to interpret the statute. *See Cimpl's*, 2008 SD 47, ¶ 20, 754 N.W.2d 1. Thus, according to that opinion, we must interpret the statute to favor the Sale Barns.

[¶ 22.] However, failure to define a term does not automatically result in an ambiguity. *Jackson v. Canyon Place Homeowner's Ass'n,* 2007 SD 37, ¶ 11, 731 N.W.2d 210, 213 (citing *Halls v. White,* 2006 SD 47, ¶ 8, 715 N.W.2d 577, 581). Moreover, we consistently only use the plain language of the statute and never examine the policy or legislative history unless the text is ambiguous. "Resorting to legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable. Absent these circumstances, we must give legislation its plain meaning. We cannot amend [the statute] to produce or avoid a particular result." *In re Estate of Howe,* 2004 SD 118, ¶ 41, 689 N.W.2d 22, 32 (quoting *Slama v. Landmann Jungman Hosp.,* 2002 SD 151, ¶ 7, 654 N.W.2d 826, 828 (quoting *Petition of Famous Brands, Inc.,* 347 N.W.2d 882, 885 (S.D.1984))); *see also In re Estate of Olson,* 2008 SD 4, ¶ 38, 744 N.W.2d 555, 566; *Jensen v. Turner County Bd. of Adjustment,* 2007 SD 28, ¶ 5, 730 N.W.2d 411, 413; *Goetz v. State,* 2001 SD 138, ¶ 16, 636 N.W.2d 675, 681; *Reider v. Schmidt,* 2000 SD 118, ¶ 9, 616 N.W.2d 476, 479. As Judge Timm noted, "[t]he FSA is not ambiguous, and the seller using a different name does not create an ambiguity in the language of the statute." We should interpret seller consistently. If interpreted consistently and using the plain language of the statute, the Sale Barns are not protected by the FSA. It takes an owner or someone with interest in the property to create a security interest. If Congress meant a fiction or a front instead of the word seller, it would have said so.

[¶ 23.] There is a scarcity of authority on this issue. We should refuse to engage in statutory interpretation that so heavily favors the Sale Barns to a lender's disadvantage without a clear directive from Congress to do so. The rationale and holding set forth in *Hufnagle* should be the law of South Dakota.

In summary:

*Watertown (# 24050)*-

1. I would affirm Judge Timm on the FSA seller issue for the reasons stated in my writing.

2. However, because Judge Timm granted summary judgment on the conversion issue and because there ***29** are many genuine issues of material fact (as discussed in Justice Zinter's writing), we must reverse and remand this issue.

3. Genuine issues of material fact also exist on the damage questions raised in Justice Zinter's writing in *South Dakota Livestock/Pipestone*, 2008 SD 48, 754 N.W.2d 29 (# 23982, # 24001, # 23984) and we must reverse and remand for trial.

[¶ 24.] KONENKAMP, Justice, joins this dissent.

S.D.,2008.
Fin-Ag, Inc. v. Watertown Livestock Auction, Inc.
754 N.W.2d 23, 2008 SD 49

Supreme Court of South Dakota.

FIN-AG, INC., Plaintiff and Appellee,

v.

PIPESTONE LIVESTOCK AUCTION MARKET, INC., Defendant and Appellant,

and

Dacotah Bank, Defendant.

Fin-Ag, Inc., Plaintiff and Appellee,

v.

South Dakota Livestock Sales of Watertown, Inc., Defendant and Appellant,

and

Dacotah Bank, Defendant.

Nos. 23982, 23984, 24001.

Argued Nov. 29, 2006.

Order Granting Rehearing Pursuant to SDCL 15-24-4 Dec. 17, 2007.[FN*]

FN* Following our inability to reach a majority decision on a judgment on all FSA seller issues, both appeals were rebriefed and reheard pursuant to SDCL 15-24-4.

Argued on Rehearing March 28, 2008.

Decided June 18, 2008.

ZINTER, Justice.

[¶ 1.] These consolidated appeals arise out of separate but related actions for conversion. Both actions were commenced by Fin-Ag, Inc., an agricultural lender, against two public livestock auction barns: Pipestone Livestock Auction Market, Inc. (Pipestone) and South Dakota Livestock Sales of Watertown, Inc. (SD Livestock) (collectively referred to as Sale Barns). FN1 Fin-Ag alleged that it had a

perfected security interest in cattle sold at Sale Barns under the name C & M Dairy, and that Sale Barns converted the collateral by failing to remit the sale proceeds to Fin-Ag. In the action against Pipestone, the circuit court (Judge Kean, Retired) granted summary judgment in favor of Fin-Ag on some sales and in favor of Pipestone on other sales. In the action against SD Livestock, the circuit court (Judge Timm) granted summary judgment in favor of *34 Fin-Ag. The principal difference between the courts' rulings involves different interpretations of the Food Security Act (FSA), 7 U.S.C. § 1631 (1985). We agree with the Pipestone court's view of the FSA. Nevertheless, because a SDCL 57A-9-609.1 statute of limitation question prevents a majority decision in favor of Fin-Ag on some FSA seller issues, and because of a number of conversion issues, both decisions are affirmed in part, reversed in part, and remanded for reconsideration consistent with this opinion.

FN1. Fin-Ag also brought similar actions against other sale barns and purchasers of the same debtors' cattle. See Fin-Ag, Inc. v. Watertown Livestock Auction, Inc., 2008 SD 49, 754 N.W.2d 23 and Fin-Ag, Inc. v. Cimpl's, Inc., 2008 SD 47, 754 N.W.2d 1.

I.

[¶ 2.] On June 27, 2002, Fin-Ag entered into an Agricultural Security Agreement (ASA) with Berwald Brothers,FN2 Calvin Berwald, Michael Berwald, Kimberly Berwald, and Sokota Dairy, LLC (collectively Berwalds). The ASA granted Fin-Ag a security interest in collateral owned by Berwalds, including farm products (cattle). Under the ASA, all

proceeds of cattle sales were to be jointly payable to Berwalds and Fin-Ag. The ASA also provided that no provision of the ASA could be interpreted to authorize non-inventory sales of collateral unless authorized by Fin-Ag in writing.

FN2. Berwald Brothers is a general partnership, including Calvin and Michael Berwald as general partners.

During the second oral argument in these cases, new counsel for Sale Barns observed that "Berwald Brothers" signed the ASA, but "Berwald Partnership" rather than "Berwald Brothers" was listed on the UCC-1/EFS. The suggestion was made that this omission entitled Sale Barns to prevail. This argument was not presented to the circuit court and was not briefed in this appeal. We therefore decline to consider the argument, leaving it to the circuit courts on remand. See Millard v. City of Sioux Falls, 1999 SD 18, ¶ 30, 589 N.W.2d 217, 221. Because we decline to consider the issue, we also decline Fin-Ag's post-oral argument request to take judicial notice of an amendment to its UCC-1/EFS filing.

[¶ 3.] On July 2, 2002, Fin-Ag filed a UCC Financing Statement with the Secretary of State. The parties agree that this qualified as an effective financing statement (EFS) under the FSA. The EFS identified Berwald Partnership, Calvin Berwald, Michael Berwald, Kimberly Berwald, and Sokota Dairy, LLC as debtors. Although all livestock and farm products were listed as collateral on the UCC-1, the EFS portion of the financing statement only described the covered farm products as dairy cattle and milk.

[¶ 4.] On August 26, 2002, Fin-Ag and Berwalds executed a promissory note in the amount of $460,000, and on January 8, 2003, they executed a

second promissory note in the amount of $4,110,000. The notes were secured by the collateral identified in the ASA. On August 23, 2004, Berwalds defaulted on the promissory notes and filed Chapter 11 bankruptcy.

[¶ 5.] Berwalds ultimately filed an amended plan of reorganization, which required Berwalds to pay Fin-Ag the entire balance of its loans plus interest, costs and Fin-Ag's attorney fees. Fin-Ag accepted this plan, and Fin-Ag receives monthly payments of $35,034.09. In the event Berwalds default on those payments, Fin-Ag has the right to immediately liquidate and sell its collateral to satisfy the remaining debt. Fin-Ag acknowledges that the value of its collateral, including livestock, crops, equipment and real estate, exceeds the balance of the debt.

[¶ 6.] These cases were commenced as a result of several pre-default sales of cattle at the Sale Barns. Both Sale Barns are public auction barns (commission merchants) registered with the Secretary of State's central filing system for effective financing statements. Therefore, each month they received portions of the master list identifying Fin-Ag's debtors and *35 collateral subject to an EFS. Most of the cattle at issue were, however, sold under the name C & M Dairy, which is a d.b.a. for Calvin and Michael Berwald, and Fin-Ag did not include C & M Dairy on its EFS.

[¶ 7.] The Sale Barns' business practices were quite similar. When cattle were delivered to each facility, a "yard man" asked the delivery person the name of the seller. SD Livestock also requested the identity of

the owner. For each of the sales at issue except two,FN3 the yard man was informed that the seller and/or owner of the cattle was C & M Dairy. Based on this information, the yard man completed a consignment ticket or "dock-in sheet" identifying the seller as C & M Dairy. Office personnel then reviewed the most recent Secretary of State's master list to determine if C & M Dairy's name appeared. Because C & M Dairy was not listed as a debtor, Fin-Ag was not made a co-payee on the proceeds checks from the cattle sales. Instead, SD Livestock generally issued checks to C & M Dairy alone. Pipestone generally issued checks to either C & M Dairy or to itself on C & M Dairy's account to pay for C & M Dairy's cattle purchases at that facility.FN4 Ultimately, none of the proceeds at issue were remitted to Fin-Ag by C & M Dairy, Berwalds or Sale Barns.

FN3. On February 10, 2004, Pipestone was notified that the seller was Calvin Berwald. On July 28, 2004, SD Livestock was notified that the seller was Michael Berwald.

FN4. Although there was no written agreement, C & M Dairy purchased cattle at Pipestone on account. Pipestone would then apply subsequent sale proceeds to C & M Dairy's account to pay for C & M Dairy's previously purchased cattle.

[¶ 8.] The following sales and purchases, involving the following sellers and payees, are involved in these appeals:

Transactions at Pipestone

February 5, 2004: C & M Dairy sold five head of cattle through Pipestone for $3,348.06. Pipestone then issued a check to C & M Dairy for $3,348.06.

February 10, 2004: Calvin Berwald sold one head of cattle through Pipestone for $851.99. Pipestone then issued one check to Calvin Berwald for $351.99 and one check to C & L Farms for $500.FN5

FN5. Pipestone does not contest its liability for the $351.99 check issued to Calvin Berwald if this Court determines that Fin-Ag complied with SDCL 57A-9-609.1. Because we determine that Fin-Ag complied with SDCL 57A-9-609.1, we direct judgment in favor of Fin-Ag for this amount. Regarding the $500 check issued to C & L Farms, the parties have not briefed liability for this check, and therefore we decline to consider the issue on appeal.

February 19, 2004: C & M Dairy purchased four head of cattle for $4,675.

February 24, 2004: C & M Dairy sold nine head of cattle through Pipestone for $5,221.51. Pipestone then issued one check to C & M Dairy for $546.51 and one check to itself for $4,675 to pay for cattle previously purchased by C & M Dairy.

March 18, 2004: C & M Dairy purchased six head of cattle for $7,575.

March 30, 2004: C & M Dairy sold twelve head of cattle through Pipestone for $8,045.79. Pipestone then issued one check to C & M Dairy for $470.79 and one check to itself for $7,575 to pay for cattle previously purchased by C & M Dairy.

April 15, 2004: C & M Dairy purchased fifteen head of cattle for $19,925.

April 20, 2004: C & M Dairy sold thirteen head of cattle through Pipestone *36 for $12,538.20. Pipestone then issued a check to itself for $12,538.20 to pay for cattle previously purchased by C & M Dairy.

April 27, 2004: C & M Dairy sold ten head of cattle through Pipestone for $6,724.42. Pipestone then issued a check to itself for $6,724.42 to pay for cattle previously purchased by C & M Dairy.

Transactions at SD Livestock

July 24, 2002-June 16, 2004: C & M Dairy, on forty-eight separate occasions, sold a total of 546 head of cattle for $272,581.85 through SD Livestock. SD Livestock issued checks to C & M Dairy for that amount.

July 28, 2004: Michael Berwald sold thirteen head of cattle through SD Livestock for $12,007.60. SD Livestock then issued a check for $12,000.60 jointly payable to Michael Berwald and Dacotah Bank.

[¶ 9.] Fin-Ag initially sued Pipestone on December 17, 2004, and SD Livestock on January 4, 2005. In both cases, Sale Barns raised SDCL 57A-9-609.1 as a defense. That statute requires a lender such as Fin-Ag to "offer" to file a criminal complaint against its debtor before commencing a conversion action against an innocent third party. After apparently realizing that it had not offered to file a complaint

before commencing the suits, Fin-Ag sent counsel for Sale Barns and Berwalds a letter, dated February 22, 2005, stating, "pursuant to SDCL 57A-9-609.1, Fin-Ag, Inc. hereby offers to file against the debtors, Berwald Partnership, Calvin Berwald, Michael Berwald, Kimberly Berwald, Sokota Dairy, LLC, a complaint as defined [in] SDCL 23A-2-1." After sending this letter, Fin-Ag re-filed and re-served identical summons and complaints on Sale Barns on March 10, 2005.

[¶ 10.] The parties filed cross-motions for summary judgment in both cases.

*The Pipestone court (Judge Kean)*

[¶ 11.] The Pipestone court held that: (1) Fin-Ag's offer complied with SDCL 57A-9-609.1; (2) C & M Dairy was the seller under the FSA; (3) because C & M Dairy was not a listed debtor on Fin-Ag's EFS, Pipestone took the cattle free of Fin-Ag's security interest under the FSA for the February 5, 2004 sale in which Pipestone acted as a commission merchant; (4) for the remaining sales, the FSA did not protect Pipestone because Pipestone was acting as a lender when it applied sale proceeds to C & M Dairy's account at Pipestone for prior purchases; and, (5) Pipestone's application of the proceeds to its account interfered with Fin-Ag's security interest, rendered Pipestone liable for conversion, and Fin-Ag suffered compensable damages.

*SD Livestock court (Judge Timm)*

[¶ 12.] The SD Livestock court held that: (1) Fin-Ag's offer complied with SDCL 57A-9-609.1; (2) Berwalds, not C & M Dairy, were the sellers under the FSA; (3) because Berwalds were listed as debtors on the EFS, SD Livestock had notice of, and was subject to, Fin-Ag's security interest under the FSA; and (4) SD Livestock was liable for conversion and Fin-Ag suffered compensable damages on all sales.

[¶ 13.] Sale Barns appeal raising the following issues which we have restated:

> 1. Whether Fin-Ag's offer to file a criminal complaint complied with SDCL 57A-9-609.1.
>
> 2. Whether the FSA protected Sale Barns from liability for conversion.
>
> *37 3. Whether Fin-Ag established entitlement to conversion.

Fin-Ag, by notice of review, contends that Pipestone was also liable for the February 5, 2004 sale by C & M Dairy, which Pipestone did not apply on account. Because all issues were decided on summary judgment we review them to:

> [D]etermine whether the moving party demonstrated the absence of any genuine issue of material fact and [established] entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party[,] and reasonable doubts should be resolved against the moving party.... Our task

on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied.

Consol. Nutrition, L.C. v. IBP, Inc., 2003 SD 107, ¶ 8, 669 N.W.2d 126, 129 (citations omitted) (alteration in original). We decide issues of law de novo. City of Colton v. Schwebach, 1997 SD 4, 8, 557 N.W.2d 769, 771.

II.

*1. SDCL 57A-9-609.1*

[¶ 14.] Before commencing an action for conversion against an innocent purchaser or a livestock auction agency dealing in farm products, a lender must first "offer" to file a criminal complaint against the debtor. SDCL 57A-9-609.1.FN6 The lender must also commence the conversion action within twenty-four months of the sale.FN7 Id.

FN6. SDCL 57A-9-609.1 provides:No cause of action for recovery of security or its value may be commenced by a secured creditor against an innocent third-party purchaser of farm products as defined in subsection (34) of § 57A-9-102, nor may such a cause of action be commenced against a livestock auction agency, as defined in chapter 40-15 and § 301 of the Packers and Stockyards Act (7 U.S.C. 201), or a public grain warehouse, or a public terminal grain warehouse, or a grain dealer as defined by chapters 49-43, 49-44, and 49-45 respectively, unless such action is commenced within twenty-four months from the date the farm products are sold and unless such action is preceded by the secured creditor offering to file against the debtor, a complaint as defined by § 23A-2-1.

FN7. SD Livestock points out that nine sales at that facility occurred prior to March 10, 2003, more than twenty-four months before the second action was commenced following the offer to file a criminal complaint. Consequently, SD Livestock argues that these nine transactions were time-barred by the twenty-four month statute of limitations in SDCL 57A-9-609.1. On appeal, Fin-Ag concedes that nine sales occurred more than twenty four months before the filing of the second complaint and were time-barred. Fin-Ag agrees that summary judgment was incorrectly granted on those sales. Therefore, the judgment on those sales is reversed.

[¶ 15.] Sale Barns argue that Fin-Ag's offer to file a complaint, in and of itself, did not comply with the statute. They contend that in addition to the offer, the statute requires that a lender must also "advise" or "inform a South Dakota State's Attorney, the South Dakota Attorney General, or a law enforcement agency of its offer to file a criminal complaint." Both circuit courts concluded that Fin-Ag's written offer was sufficient. Because this is a matter of statutory construction, we review the matter de novo. In re Estate of Jetter, 1997 SD 125, ¶ 10, 570 N.W.2d 26, 28.

[¶ 16.] A fundamental rule of statutory construction is that " 'the intention of the law is to be primarily ascertained from the language expressed in the statute.' " Huber v. Dept. of Pub. Safety, 2006 SD 96, ¶ 14, 724 N.W.2d 175, 179 (quoting *38 State v. $1,010.00 in Am. Currency, 2006 SD 84, ¶ 8, 722 N.W.2d 92, 94 (citation omitted)). Furthermore, " 'we may not, under the guise of judicial construction, add modifying words to the statute or change its terms.' " City of Sioux Falls v. Ewoldt, 1997 SD 106, ¶ 13, 568 N.W.2d 764, 767 (quoting State v. Franz, 526 N.W.2d

718, 720 (S.D.1995)). " '[I]t is always safer not to add to or subtract from the language of a statute unless imperatively required to make it a rational statute.' " Id. (quotation omitted). " 'The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said[.]' " Martinmaas v. Engelmann, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611 (quotation omitted).

[¶ 17.] These rules create an insurmountable barrier to Sale Barn's argument. The statute fails to require that in addition to the offer, a State's Attorney, the Attorney General, or a law enforcement agency must be "informed" or "advised" that an offer was made to the buyer.FN8 Because the statute does not impose *39 this additional step, we may not "add such language [ ] that is not there[.]" Hannon v. Weber, 2001 SD 146, ¶ 5, 638 N.W.2d 48, 49. Considering the absence of statutory language requiring Sale Barn's proposed additional step, we affirm the circuit courts' judgments that Fin-Ag complied with the statute by making offers to the Sale Barns that it would file criminal complaints.

FN8. It is significant that SDCL 57A-9-609.1 does not direct where the initial offer should be made. In light of this omission, it is reasonable to believe that the Legislature did not intend law enforcement entanglement at this civil stage of the controversy. It is reasonable because an innocent purchaser of collateral will only become a "victim" if the secured creditor continues to pursue the civil conversion action, thereby subjecting the purchaser to double liability. By failing to mandate law enforcement intervention at the offer stage of the civil controversy, the Legislature has given a potential victim a voice in the matter. The failure to mandate law enforcement intervention at this stage requires the secured creditor to communicate with an innocent

victim, thereby allowing all parties to consider the consequences of their proposed actions before they become fully immersed in civil and criminal litigation.

The dissent suggests the Legislature did not have these purposes in mind. Instead, the dissent suggests that the Legislature was concerned with effective law enforcement, and that failing to make an offer with a law enforcement agency would not result in an effective criminal prosecution thereby making the offer a useless act. Infra¶¶ 49-50. There is, however, nothing in the text or history of the statute to support the dissent's speculation. If anything, the Legislature's enactment of this measure as a statute of limitations for the filing of a civil action suggests that effective criminal prosecution was not its motivation. This is confirmed by the title of the legislation of which SDCL 57A-9-609.1 was a part: "An Act to reenact the revised secured transactions article of the Uniform Commercial Code." See 2000 SD Laws ch. 231, § 9-609.1.

The dissent also incorrectly suggests that because Sale Barns were "aware of Fin-Ag's claim to the proceeds from Berwalds' sale of cattle," the offer subjects parties to a criminal misprison of a felony offense. Infra ¶ 51. This argument fails to acknowledge the distinction between an action for civil conversion and a criminal action for the sale of mortgage property. The dissent is correct that at the time the offer is made under SDCL 57A-9-609.1, the secured creditor is simply "aware of [the secured creditor's] claim to the proceeds." Id. This is consistent with the pursuit of a civil action for conversion: the plaintiff need only be aware that an innocent transferee (in this case, a sale barn) has sold secured cattle. See infra ¶ 34. Awareness of wrongful conduct on the part of the debtor is immaterial. Rushmore State Bank v. Kurylas, Inc., 424 N.W.2d 649, 659 (S.D.1988). Therefore, the knowledge necessary for a secured creditor to proceed with a civil conversion action is far less than the knowledge of wrongful criminal conduct necessary to know that a criminal sale of mortgaged property has occurred under SDCL 44-1-12. In the latter criminal offense, the secured creditor must not only know that an innocent party has obtained control of its collateral, but also that its

debtor has willfully disposed of that collateral and its proceeds. Id. Considering this distinction, considering the short occurrence statute of limitations, and considering the substantial time that often expires before a secured creditor is even aware of a debtor's disposition of collateral, it is inconceivable that the Legislature would have intended criminal consequences for a secured creditor's act of making the statutory offer before it had criminal knowledge of the circumstances under which its debtor participated in the sale. More importantly, regardless of the interpretation of SDCL 57A-9-609.1, the statute does not alter a person's duty to report if the person has the requisite level of knowledge that a felony has been committed. The misprison duty remains under either interpretation.

Finally, the dissent's suggestion that "[o]ur Legislature has not condoned the practice" of "attempting to negotiate an arrangement that might avoid law enforcement intervention," see infra¶¶ 53-54 is simply incorrect. The Legislature often requires civil notice and negotiation to avoid law enforcement involvement after the commission of a crime but before a prosecution is commenced. In the area of theft alone, the Legislature has mandated similar civil notices in three instances. See SDCL 22-30A-32 (requiring a civil notice of dishonor and opportunity to pay an insufficient funds or no account check before the criminal prosecution is commenced); SDCL 22-30A-40-44 (requiring similar preliminary civil efforts to resolve criminal motor vehicle fuel theft); and SDCL 22-30A-19.3 (involving preliminary civil demands in retail theft).

### *2. FSA Protection for Farm Products Purchased in the Ordinary Course of Business*

[¶ 18.] The next issue is whether the FSA preempted the state law conversion actions and allowed the Sale Barns to take free of Fin-Ag's security interests. Sale Barns argue that they are entitled to FSA protection from conversion because: C & M Dairy was the seller of the cattle; C & M Dairy was not on the master list

of effective financing statements identifying Fin-Ag's debtors and collateral; and therefore Sale Barns did not have the written notice necessary to disqualify them from protection under the FSA.

[¶ 19.] Fin-Ag, on the other hand, argues that Berwalds, not C & M Dairy, were the sellers of the cattle, and that because Berwalds were on the master list, Sale Barns had written notice of Fin-Ag's security interest disqualifying Sale Barns from protection under the FSA. Alternatively, Fin-Ag argues that even if C & M Dairy were considered the seller for purposes of notice, Sale Barns are still not protected because the FSA limits the Sale Barns' protection to taking free of security interests "created by the seller." 7 U.S.C. § 1631(d). And, Fin-Ag contends that C & M Dairy did not create the security interest, Berwalds did.

[¶ 20.] We thoroughly addressed these same "seller" issues involving Fin-Ag and virtually identical sales by C & M Dairy and Berwalds in Fin-Ag, Inc. v. Cimpl's, Inc., 2008 SD 47, 754 N.W.2d 1.FN9 We concluded that the FSA provided the buyers of farm products protection from conversion because: C & M Dairy was the seller; FN10 C & M Dairy was not on the master *40 list giving buyers notice of Fin-Ag's security interest; and because C & M Dairy was the alter ego of the Berwalds, C & M Dairy was regarded as having created the security interest within the meaning of 7 U.S.C. § 1631(d). Id.

FN9. Although Sale Barns are commission merchants unlike the buyer involved in Cimpl's, the applicable provisions of the FSA are the same. Compare 7 U.S.C. § 1631(d)(e) and §

1631(g).

FN10. The relevant facts in Cimpl's are also within the Pipestone/SD Livestock record. In addition to the facts present in Cimpl's, this record further indicates that C & M Dairy was the seller. Calvin Berwald's deposition testimony reflected:C & M Dairy was our cattle business, and Pipestone Livestock-I mean I bought thousands of cattle from that barn when I was in the cattle business. The only way they knew us was by C & M Dairy.

...

I don't think we ever sold anything at that place that wasn't listed and [sic] C & M Dairy.

...

C & M Dairy was our Clear Lake facility which we used mostly for buying and selling cattle. I mean we used that-that deal for, I mean, I suppose ten years. There was a milk permit under there, too.

[¶ 21.] In the instant cases all but two sales FN11 were made under the name C & M Dairy. Further, like the situation in Cimpl's, C & M Dairy was the alter ego (a d.b.a.) of Berwalds. Accordingly, for the reasons expressed in Cimpl's, we again conclude that to the extent Sale Barns took the cattle sold by C & M Dairy,FN12 it took them free of Fin-Ag's security interest under the FSA, and Sale Barns cannot be liable for conversion.FN13 We therefore reverse the judgment against SD Livestock for the July 24, 2002-June 16, 2004 sales by C & M Dairy. Because Michael Berwald was the seller on the July 28, 2004 sale, and because Michael Berwald was identified on Fin-Ag's EFS, the notice exception applied, and SD Livestock was not entitled to FSA protection for that sale. Liability for that sale is governed by our discussion of state law conversion in Issue 3, infra.

FN11. The two exceptions are the February 10, 2004 sale by Calvin Berwald at Pipestone and the July 28, 2004 sale by Michael Berwald at SD Livestock.

FN12. In determining who was the seller, the SD Livestock court failed to consider that the Berwalds had been doing business as C & M Dairy for a considerable period of time. The FSA requires that the master list must give notice that the "seller" is subject to an EFS. 7 U.S.C. 1631(e)(3). And, an EFS must identify all persons who are "indebted to the secured party." 7 U.S.C. 1631(c)(4)(C). This would include Calvin and Michael Berwald d.b.a. C & M Dairy.

FN13. Fin-Ag argues that Sale Barns knew, or should have known that C & M Dairy was, in fact, Berwalds. The basis of this argument is an investigation conducted by Fin-Ag wherein Pipestone admitted that Calvin Berwald was the individual who delivered the cattle for sale at Pipestone. In that investigation, Pipestone also admitted that Calvin Berwald directed Pipestone how the cattle sale proceeds should be paid. Fin-Ag points out that Pipestone would issue proceeds checks to C & M Dairy but use the same mailing address that it used for sales made by Calvin Berwald. Moreover, there is a dispute as to whose name was on the Pipestone account, Berwalds or C & M Dairy. Finally, the checks issued to C & M Dairy were endorsed by either Calvin or Michael Berwald. A similar argument applies to SD Livestock.

Those allegations, however, do not create a genuine issue of material fact for trial. "A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law." Weitzel v. Sioux Valley Heart Partners, 2006 SD 45, ¶ 17, 714 N.W.2d 884, 891 (citation omitted). Here, even if Sale Barns had actual knowledge that C & M Dairy consisted of Berwalds, they still did not have written notice from the master list that C & M Dairy was subject to Fin-Ag's security interest under 7 U.S.C. § 1631(g)(2)(D)(i)(ii). Sale Barns had no additional duty to check public records to determine the precise legal relationship between the Berwalds and C & M Dairy. Because Sale Barns had no duty to determine the legal

> relationship between Berwalds and C & M Dairy, and because actual knowledge of the security interest is irrelevant, [ Cimpl's, 2008 SD 47, ¶ 15, 754 N.W.2d 1,] these allegations did not create a genuine issue of material fact preventing summary judgment on this issue.

[¶ 22.] For the same reasons, Pipestone is protected by the FSA for C & M Dairy's sales, and the judgment in favor of Pipestone is affirmed to the extent Pipestone*41 paid the proceeds of the sales to C & M Dairy (the February 5, 2004 sale). FSA protection is not, however, automatically extended to the remaining sales where Pipestone retained the proceeds to satisfy C & M Dairy's antecedent debt for prior cattle purchases. We now discuss Pipestone's liability for those proceeds under the framework set forth in Consolidated Nutrition, 2003 SD 107, 669 N.W.2d at 126.

*Acting as a Lender or as a Buyer in the Ordinary Course*

[¶ 23.] The Pipestone court concluded that to the extent Pipestone applied the proceeds on account, it was acting as a lender, not as a "buyer in the ordinary course of business." Those sales occurred on February 24 ($4,675), March 30 ($7,575), April 20 ($12,538.20), and April 27, 2004 ($6,724.42). The Pipestone court concluded that there was no FSA protection for those sales, noting that they involved a priority dispute over proceeds governed by the Uniform Commercial Code. We agree.

[¶ 24.] Although a buyer in the ordinary course is generally protected by the FSA, it loses that

protection when it acts as a lender by retaining sale proceeds to satisfy an antecedent debt. Consolidated Nutrition, 2003 SD 107, ¶ 15, 669 N.W.2d at 131. A " 'buyer in the ordinary course' [is entitled to protection] under the FSA to the extent that it purchase[s] the [farm products] and [pays the seller]. However, [the buyer is] not entitled to that [protection] to the extent [ ] it act[s] as a creditor and sets off the sale proceeds to satisfy [the seller's] preexisting debt." Id. ¶ 14. The application of proceeds to a preexisting debt is not protected by the FSA because the buyer is not acting as a "buyer in the ordinary course." Id. ¶ 12.

> "Buying" does not include receiving goods or document of title under a preexisting contract as security "for or in total or partial satisfaction of a money debt," SDCL 57A-1-201(b)(9), thereby excluding "attaching creditors and others who take goods in satisfaction of preexisting debts" from the definition of "buyer in ordinary course."

Id. (citing Farmers & Merchants State Bank v. Teveldal, 524 N.W.2d 874, 878 (S.D.1994) (citing 2 James White & Robert Summers, Uniform Commercial Code § 26-13, at 533 n. 2 (3rd ed. 1988))). Because the FSA does not provide protection for such buyers and commission merchants, the Pipestone court was correct in concluding that the Uniform Commercial Code determined the priority of Fin-Ag's and Pipestone's conflicting claims.

[¶ 25.] Pipestone, however, argues that Consolidated Nutrition does not apply because this is a Minnesota transaction not governed by South Dakota law. We

disagree. Even if Minnesota had the most significant relationship with these transactions (the Pipestone transactions occurred in Minnesota and involved a Minnesota sale barn) and Minnesota law applied, Pipestone's argument is misplaced. Consolidated Nutrition involved an interpretation of the FSA, a federal enactment that is applicable in both States. Furthermore, Fin-Ag has cited no conflicting Minnesota interpretation of the FSA.

[¶ 26.] Alternatively, Fin-Ag argues that Consolidated Nutrition is distinguishable because the hog procurement contract in that case is different than C & M Dairy's purchases on account. We again disagree. Pipestone allowed C & M Dairy to purchase cattle "on account" and Pipestone subsequently used the proceeds from future sales to pay the debt due on that account. Although there was no written contract as in Consolidated Nutrition, there was an open account that created an implied contract requiring payment for the *42 antecedent debt. See SDCL 53-01-3 (providing that an implied contract is one whose "existence and terms ... are manifested by conduct").

[¶ 27.] Because the FSA governs farm products purchases rather than priority disputes between competing lenders, this Court concludes that Pipestone had no FSA protection for those proceeds it paid to itself on account for C & M Dairy's prior purchases. Therefore, the Pipestone court is affirmed on this issue, and Pipestone's liability for conversion on the transactions involving proceeds is governed by Issue 3, regarding conversion under state law. Before addressing that issue, however, one FSA issue

remains: whether Fin-Ag's EFS description of the collateral was insufficient.

*EFS Description of the Collateral under the FSA*

[¶ 28.] SD Livestock raises this issue as an alternative argument for FSA protection. For a creditor to be entitled to the notice exception to buyer protection under the FSA, the EFS must not only give notice of the seller, but also the collateral. 7 U.S.C. § 1631(g)(2)(D)(i)(ii). Therefore, even if Fin-Ag provided notice of the seller in its EFS as required by the FSA, Fin-Ag's EFS must have also adequately described the cattle. SD Livestock contends that Fin-Ag's EFS was insufficient because it only listed "dairy cattle" as collateral, whereas many of the cattle sold were not dairy cattle. Relying on the sales tickets, SD Livestock points out that many sales involved: "white-face, red, cross-bred, Charolais, and Charolais-cross" cattle. SD Livestock contends that these are not dairy cattle, and the circuit court's denial of FSA protection must be reversed and remanded because the circuit court assumed that all of the cattle sold were dairy cattle.

[¶ 29.] The EFS must contain "a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable; and a reasonable description of the property." 7 U.S.C. § 1631(c)(4)(D)(iv). A statement that substantially complies with this requirement, "even though it contains minor errors that are not seriously misleading," will qualify as an EFS. 7 U.S.C. § 1631(c)(4)(I). The question is whether Fin-Ag's collateral description of "dairy cattle" was

seriously misleading. Although minor errors that are not seriously misleading will not invalidate an EFS, this error could qualify as seriously misleading if a distinction between dairy and other cattle is recognized in the cattle industry.

[¶ 30.] This issue is complicated by the United States Secretary of Agriculture's regulations and interpretive opinions,FN14 as well as the South Dakota Secretary of State's implementing rules, which only offer two category descriptions for cattle: "dairy cattle" or "beef cattle." There is no generic "cattle" description available under the South Dakota rules. FN15 As previously noted, however, SD Livestock raises this issue as an alternative argument for FSA *43 protection. Therefore, it need only be addressed to the extent one concludes that there is no FSA protection because C & M Dairy was not the seller who must be regarded as having created the security interest.

FN14. See generally 9 CFR § 205.106.

FN15. According to South Dakota's filing procedures, a secured party completing an EFS must list a code for the farm products by selecting a code from a list provided. See Chris Nelson, Secretary of State, UCC Filing Procedures (2003). Notably, there is no EFS code listed for "cattle." Instead, there are separate codes for "beef cattle" and "dairy cattle." Id. Fin-Ag's EFS listed only "dairy cattle and milk." The cattle at issue here would have most likely been covered by the EFS if Fin-Ag would have listed the codes and descriptions for both "dairy cattle" and "beef cattle." However, by listing only the "dairy cattle" code and description, Fin-Ag may have excluded other types of cattle.

[¶ 31.] In this case, SD Livestock is generally entitled to FSA protection because C & M Dairy was the seller who must be regarded as creating a security interest in all but one relevant sale (the July 28, 2004 SD Livestock transaction in which Michael Berwald sold 13 head of cattle). And on that transaction, SD Livestock's sales ticket reflects that all cattle were dairy cattle. Therefore, the dairy cattle description was not misleading, the notice exception applied, and SD Livestock was not entitled to FSA protection for that sale. Because all of the remaining SD Livestock sales involving different types of cattle were otherwise protected by the FSA, we need not decide the collateral description issue for those sales.

*3. Conversion*

[¶ 32.] Under this writing, the FSA did not protect Pipestone in the transactions in which it was acting as a lender or the February 10, 2004 Calvin Berwald sale. Nor did the FSA protect SD Livestock for the July 28, 2004 Michael Berwald sale. Under Justice Sabers' writing, additional sales would not be protected by the FSA. Sale Barns next argue that even if they were not protected by the FSA, Fin-Ag failed to make sufficient summary judgment showings to support the judgments for conversion.FN16 Sale Barns specifically contend Fin-Ag failed to prove that: (1) the cattle sold were cattle owned by Berwalds subject to Fin-Ag's security interest; (2) the sales were unauthorized; and (3) Fin-Ag suffered compensable damages, or alternatively, that compensable damages could have reasonably been avoided or mitigated.

FN16. The parties have not raised a choice of laws issue. They have briefed and argued this matter under South Dakota law. We therefore generally review the matter under South Dakota law.

[¶ 33.] To prevail on summary judgment, "a plaintiff must establish each element of his or her prima facie case." Hatchett v. Philander Smith College, 251 F.3d 670, 674 (8th Cir.2001) (citation omitted). " '[T]hose resisting summary judgment must show that they will be able to place sufficient evidence in the record at trial to support findings on all the elements on which they have the burden of proof.' " Bordeaux v. Shannon County Schools, 2005 SD 117, ¶ 14, 707 N.W.2d 123, 127 (quoting Chem-Age Indus., Inc. v. Glover, 2002 SD 122, ¶ 18, 652 N.W.2d 756, 765) (citation omitted); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265, 273 (1986) (stating that entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial). Therefore, to prevail on the various claims and defenses, Fin-Ag must have submitted sufficient evidence to establish the elements of conversion, and Sale Barns must have submitted sufficient evidence to establish its affirmative defenses. Sufficient evidence requires establishment of a prima facie case. Mushitz v. First Bank of South Dakota, N.A., 457 N.W.2d 849, 859 (S.D.1990). "[A] prima facie case has been established [when] there 'are facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain.' "

*44 Sandner v. Minnehaha County, 2002 SD 123, ¶ 13, 652 N.W.2d 778, 783 (quoting Rosen's Inc. v. Juhnke, 513 N.W.2d 575, 577 (S.D.1994)).

[¶ 34.] "Conversion is the unauthorized exercise of control or dominion over personal property in a way that repudiates an owner's right in the property or in a manner inconsistent with such right." Chem-Age Indus., Inc. v. Glover, 2002 SD 122, ¶ 20, 652 N.W.2d 756, 766 (citation omitted). In general, a transferee who takes secured collateral from a debtor takes it subject to the creditor's security interest and can be held liable for conversion. Rushmore State Bank v. Kurylas, Inc., 424 N.W.2d 649, 659 (S.D.1988) (citing UCC 9-306, cmt. 3). A cause of action for conversion exists against an auction agency based on the debtor's lack of authority to sell the collateral. Sanborn County Bank, Inc. v. Magness Livestock Exch., Inc., 410 N.W.2d 565, 567 (S.D.1987) (citations and emphasis omitted). Therefore, a " 'commission merchant who receives property from his principal, sells it under the latter's instructions and pays him the proceeds of the sale, is guilty of a conversion if his principal had no title thereto or right to sell the property.' " Id. (quotation omitted). The basis of the liability for conversion is the fact that the commission merchant stands in the shoes of his principal. Id. (citations omitted). It is immaterial that the agent had neither knowledge nor notice that the principal was committing a wrong by the sale. Id.

*Were These Berwalds' Cattle Subject to Fin-Ag's Security Interest*

[¶ 35.] To be entitled to summary judgment, Fin-Ag must have first made a prima facie showing that the cattle sold were Berwald cattle subject to Fin-Ag's security interest. To make that showing, Fin-Ag offered a deposition of Calvin Berwald, taken in a bankruptcy proceeding, as evidence of Berwalds' ownership of the cattle. Sale Barns objected to the use of this deposition. Sale Barns point out that they were neither present nor represented at this deposition, nor did they have notice of the deposition. In fact, they were not even aware of a potential claim against them at the time of this deposition. Therefore, they contend the deposition could not be used against them under SDCL 15-6-32(a). Sale Barns also allege that even if the deposition is considered, it does not supply evidence that Berwalds owned the specific cattle sold in each of these transactions.

[¶ 36.] At the summary judgment stage, however, even assuming that the deposition could not be used, Fin-Ag was only required to establish a prima facie case; i.e., sufficient facts which if unanswered would justify persons of ordinary reason and fairness in believing that these were collateral cattle owned by Berwalds. See Sandner, 2002 SD 123, ¶ 13, 652 N.W.2d at 783. In our view, aside from the Calvin Berwald deposition, Fin-Ag established a prima facie case.

[¶ 37.] Regarding Pipestone, Fin-Ag showed: (1) that Pipestone withheld money from the C & M Dairy sales because Calvin Berwald owed money for prior cattle purchases; (2) that Calvin Berwald directed where C & M Dairy's proceeds should be sent; and

(3) that the proceeds checks were endorsed by Calvin or Michael Berwald. Regarding SD Livestock, the payments made to C & M Dairy were also sent to the Berwalds home and were endorsed by Calvin or Michael Berwald. This evidence, if unanswered, would justify a person of ordinary reason in believing that Berwalds had an ownership interest in the cattle that was subject to Fin-Ag's security interest. Furthermore, Sale Barns did not identify contradictory evidence. Instead, they only argue that Fin-Ag's showing was insufficient. This argument*45 overlooks the minimal quantum of proof necessary to make a prima facie showing. We conclude that a prima facie case was established, that Sale Barns did not identify conflicting facts, and the circuit courts did not err in explicitly (or implicitly) deciding that the sales at issue involved Berwalds' cattle subject to Fin-Ag's security interest.

*Unauthorized (and Authorized) Sales*

[¶ 38.] Sale Barns next contend that Fin-Ag failed to make a sufficient summary judgment showing that the sales were unauthorized. This issue encompasses both the elements of conversion and defenses. As an element of its conversion claim, Fin-Ag must have established that the sales were unauthorized; i.e. that Sale Barns exercised unauthorized control or dominion over Fin-Ag's collateral. Chem-Age Indus., 2002 SD 122, ¶ 20, 652 N.W.2d at 766. On the other hand, Sale Barns had the burden of establishing its defenses, i.e., that through its conduct, Fin-Ag authorized or waived its interests in the sales. Aberdeen Prod. Credit Ass'n v. Redfield Livestock Auction, Inc., 379 N.W.2d 829, 831 (S.D.1985).

[¶ 39.] Fin-Ag established its prima facie case of showing unauthorized sales through: (1) the ASA, which prohibited non-inventory sales without the written consent of Fin-Ag, and (2) the affidavit of Robert Goetz, the operations manager of Fin-Ag, who stated that Berwalds were not authorized to sell cattle under the name C & M Dairy. Furthermore, Sale Barns did not identify conflicting facts. Instead, they again only argued the defense that Fin-Ag authorized the sales through another provision of the ASA permitting inventory sales in the ordinary course of business. Sale Barns, however, offered no facts establishing a prima facie case that these cattle involved authorized sales of inventory. We therefore conclude that Fin-Ag met its burden showing that the sales were unauthorized.

[¶ 40.] Sale Barns next raise the defense that these were authorized sales in which Fin-Ag waived its rights because Fin-Ag impliedly allowed Berwalds to sell over 2,000 head of cattle through C & M Dairy to various buyers over the course of two years, while never requiring that Fin-Ag be included as a co-payee.FN17 Implied authorization is a defense. See Aberdeen Prod. Credit, 379 N.W.2d at 834. Sale Barns support this *46 implied authorization defense with evidence suggesting that Fin-Ag should have known Berwalds were selling these cattle through C & M Dairy. FN18 Fin-Ag responds with the ASA's requirement of a written authorization and the affidavit of Goetz. Although these conflicting facts relating to Fin-Ag's knowledge and conduct might, in other legal contexts, create an issue of fact relating to implied authorization, implied authorization

through course of dealing is not recognized as a matter of law in this UCC context. An implied authorization to sell collateral is not recognized in either South Dakota or Minnesota if it is contrary to the express provisions of the security agreement. Aberdeen Prod. Credit, 379 N.W.2d at 832, Wabasso State Bank v. Caldwell Packing Co., 308 Minn. 349, 356, 251 N.W.2d 321, 325 (1976).FN19 Therefore, Sale Barns' showings did not raise a material issue of disputed fact relating to its defense of implied authorized sales of cattle.

FN17. Sale Barns also argue that the sales were authorized, and Fin-Ag's interests were waived or extinguished because Fin-Ag had no security interest as a result of its failure to amend its financing statement/EFS to reflect material changes under 7 U.S.C. § 1631(c)(4)(D). However, we need not address the FSA aspects of this issue because we have already determined that Sale Barns are generally entitled to FSA protection.

To the extent that a failure to amend the financing statement may arise under the UCC on remand, the parties may litigate that issue. Judge Kean did not address the issue in his decision. Although Judge Timm addressed it, there are material issues of disputed fact precluding summary judgment on the issue of the duty to amend a financing statement (as well as an EFS). Those facts include allegations that Fin-Ag should have been aware that C & M Dairy was making substantial cattle sales in the region under the name C & M Dairy. There was also a prior lawsuit in which Fin-Ag acknowledged that C & M Dairy was a d.b.a. for Berwalds business. See infra n. 18. These facts are relevant to determine whether Fin-Ag should have amended its financing statement (or EFS) to preserve its security interest. Whether Fin-Ag's research of alleged unauthorized cattle sales was reasonably sufficient to not require amendment is a question of fact that is not appropriate for summary judgment. Considering the conflicting facts, at the

summary judgment stage, Judge Timm erred in finding that Fin-Ag's research was sufficiently reasonable.

FN18. On October 4, 2002, an un-related lawsuit was brought against Berwalds, "d/b/a C & M Dairy" and Fin-Ag, Inc. This lawsuit, Fin-Ag responds, did not pertain to the sale of cattle by Berwalds under the name C & M Dairy; instead, it concerned a debt for consulting services and breach of a loan agreement. However, the lawsuit arose when Calvin and Michael Berwald d/b/a C & M Dairy entered into a purchase agreement in which they sold 150 head of cattle to R & J Van Beek, LLC. The purchase order, incorporated into the complaint, specifically listed C & M Dairy as the seller. R & J Van Beek, LLC commenced the action against Berwalds, specifically Calvin and Michael Berwald d/b/a C & M Dairy, over this purchase agreement. Fin-Ag was also a named party in the lawsuit. In its answer in that lawsuit, Fin-Ag admitted that Berwalds, d/b/a C & M Dairy, owned and operated a dairy operation in Toronto, South Dakota. Following this acknowledgment, Fin-Ag did not amend its financing statement to include C & M Dairy as a debtor.

FN19. Sale Barns also argue Fin-Ag authorized the sales under SDCL 57A-9-315(a)(1), providing that although a security interest continues in collateral notwithstanding its sale, its disposition may be authorized. Because this statute was not raised before the circuit courts, we decline to review this argument for the first time on appeal. See State v. Olson-Lame, 2001 SD 51, ¶ 6, 624 N.W.2d 833, 834; Beckel v. Gerber, 1998 SD 48, ¶ 24, 578 N.W.2d 574, 579.

*Damages*

[¶ 41.] Damages are a basic prerequisite to recovery on a conversion theory. "[T]he foundation for the action of conversion ... rests upon the unwarranted interference by defendant with the dominion over the property of the plaintiff from which injury to the

latter results." Chem-Age Indus., Inc., 2002 SD 122, ¶ 20, 652 N.W.2d at 766 (emphasis added). As the party seeking to recover damages, Fin-Ag bears the burden of proving damages " 'with reasonable certainty.' " Kobbeman v. Oleson, 1998 SD 20, ¶ 6, 574 N.W.2d 633, 635 (quotation omitted). SDCL 21-3-3 FN20 creates a presumption that damages were incurred "at the time of the conversion ..." and allows fair compensation for the time and money expended in pursuit of the *47 property. However, the presumption does not eliminate the need for a conversion plaintiff to allege and present proof of actual harm. Security State Bank v. Benning, 433 N.W.2d 232, 234-35 (S.D.1988). "It is fundamental that damages which are uncertain, contingent or speculative cannot be made the basis of recovery." Kunkel v. United Sec. Ins. Co. of N.J., 84 S.D. 116, 135, 168 N.W.2d 723, 733 (1969).

FN20. SDCL 21-3-3 provides:The detriment caused by the wrongful conversion of personal property is presumed to be:

(1) The value of the property at the time of the conversion, with the interest from that time;

(2) Where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party;

(3) A fair compensation for the time and money properly expended in pursuit of the property.

Such presumptions cannot be repelled in favor of one whose possession was wrongful from the beginning by his subsequent application of the property to the benefit of the owner, without his consent.

[¶ 42.] Sale Barns argue that in the event we conclude Fin-Ag established a prima facie case of conversion, Fin-Ag failed to establish compensable damages. They contend that all of the proceeds from the sales were returned to the dairy operation for which Fin-Ag made the loans. Sale Barns also contend that Fin-Ag suffered no damages because they will be made whole in the Berwald bankruptcy. Sale Barns point out that Fin-Ag is an over-secured creditor, and under the confirmed bankruptcy plan, Fin-Ag is scheduled to receive the balance of the indebtedness plus interest and attorney's fees. Sale Barns further point out that Fin-Ag still retains an interest in Berwalds' collateral. Thus, Sale Barns contend that Fin-Ag will be able to liquidate and sell the secured collateral to cover the loans should the plan not be completed. Sale Barns finally contend Fin-Ag failed to avoid and/or mitigate their damages.

[¶ 43.] The circuit courts did not, however, consider each of these issues. Additionally, on remand, a defense relating to conversion may be decided such that the issue of damages need not be reached. We therefore decline Sale Barns request to direct summary judgment on damages. The damage issues are remanded for consideration by the circuit courts. See Aberdeen Prod. Credit, 379 N.W.2d at 832-33.

[¶ 44.] For the foregoing reasons, we

1. Affirm both courts' conclusions that Fin-Ag's offers complied with SDCL 57A-9-609.1;

2. Although there are not three votes to affirm any FSA seller issue involving C & M Dairy in favor of Fin-Ag, there are three or more votes and we therefore (to the extent not otherwise covered by this opinion) generally affirm the result of the Pipestone court judgment in favor of Pipestone and reverse the result of the SD Livestock court judgment against SD Livestock;

3. Affirm the Pipestone court's conclusion that the FSA did not protect Pipestone for those sales in which it applied proceeds to C & M Dairy's account;

4. Pursuant to the parties' agreement, reverse the SD Livestock court's judgment regarding the nine sales that occurred prior to March 10, 2003; and,

5. Reverse and remand the judgments on any non-FSA protected sales for further proceedings consistent with this Court's opinion on the conversion issues.

[¶ 45.] MEIERHENRY, Justice, concurs.

[¶ 46.] GILBERTSON, Chief Justice dissents in part and concurs in result in part.

[¶ 47.] SABERS and KONENKAMP, Justices, dissent in part and concur in result in part.

GILBERTSON, Chief Justice (dissenting in part and concurring in result in part).FN21

FN21. Because, in my view, Fin-Ag failed to comply with SDCL 57A-9-609.1, all sales are governed by that statute and the suits are barred. Therefore, I generally dissent, concurring in result only in: (1) those sales in Pipestone in which Judge Kean held in favor of Pipestone; and, (2) those sales in SD Livestock in which the Court reverses Judge Timm.

[¶ 48.] I respectfully disagree with the Court's analysis of issue one. The Court's *48 result should be derived from, and its opinion should end with, the analysis of this issue. I would dismiss both proceedings for failure of the plaintiff to comply with the mandatory dictates of SDCL 57A-9-609.1.

[¶ 49.] The Court is mistaken in its interpretation of SDCL 57A-9-609.1. Its rationale, in footnote 8, for holding that Fin-Ag complied with the statutory prerequisite for filing a cause of action by sending a letter to counsel for Sale Barns and Berwalds offering to file a criminal complaint, exceeds the bounds of statutory-interpretation authority vested in the courts. See Martinmaas v. Engelmann, 2000 SD 85, ¶ 49, 612 N.W.2d 600, 611 (opining that statutory intent is to be determined from what the Legislature said, rather than what the courts think it said) (citation omitted). Ultimately, the Court's holding means that the statute can be satisfied by a meaningless act. See City of Sioux Falls v. Ewoldt, 1997 SD 106, ¶ 17, 568 N.W.2d 764, 768 (the courts obligation is to interpret law in a manner avoiding absurd results); Yankton Ethanol, Inc. v. Vironment, Inc., 1999 SD 42, ¶ 15, 592 N.W.2d 596, 599 (citing the well established precept that [t]here is a presumption against a construction which would render a statute ineffective or meaningless[ ] )

(quoting In re Real Estate Tax Exemption for Black Hills Legal Services, Inc., 1997 SD 64, ¶ 12, 563 N.W.2d 429, 432; Rapid City Ed. Assn. v. School Dist., 522 N.W.2d 494, 498 (S.D.1994)) (citing Nelson v. Sch. Bd. of Hill City Sch. Dist., 459 N.W.2d 451, 455 (S.D.1990)). See also Scott v. North Dakota Workers Comp. Bureau, 587 N.W.2d 153, 156 (N.D.1998) (it is presumed the legislature acts with a purpose and does not perform useless acts); Bickel v. Jackson, 530 N.W.2d 318, 320 (N.D.1995) (there is a presumption the legislature acts with purpose and does not perform idle acts).

[¶ 50.] Either the Attorney General, a State's Attorney or law enforcement are authorized to act upon a request to file a criminal complaint. An offer to file a criminal complaint, made to a party or agency without authority to act upon it, has no effect. Counsel for Sale Barns and Berwalds had neither the authority nor obligation to commence a criminal proceeding that would be filed pursuant to SDCL 23A-2-1, as required by SDCL 57A-9-609.1. Thus, Fin-Ag's letter to counsel offering to file the complaint was ineffectual and failed to satisfy the statutory mandate. To find that this offer to file a complaint satisfied the statutory prerequisite to filing a cause of action is to conclude that SDCL 57A-9-609.1 can be satisfied by any irrelevant act, no matter how unlikely it is to lead to calling the attention of the appropriate law enforcement authorities to the situation.

[¶ 51.] Moreover, and more seriously, the Court's interpretation of SDCL 57A-9-609.1 places future parties in jeopardy of violating our misprision of

felony statute, SDCL 22-11-12. Sale Barns, Berwalds and Fin-Ag were aware of Fin-Ag's claim to the proceeds from Berwalds' sale of cattle by the date of the summons and complaint in this action and notice of offer to file a criminal complaint. This creates additional legal problems for the Sales Barns and Fin-Ag under the Court's rationale.

[¶ 52.] SDCL 22-11-12 provides:

> Any person who, having knowledge, which is not privileged, of the commission*49 of a felony, conceals the felony, or does not immediately disclose the felony, including the name of the perpetrator, if known, and all of the other relevant known facts, to the proper authorities, is guilty of misprision of a felony. Misprision of a felony is a Class 1 misdemeanor. There is no misprision of misdemeanors or petty offenses.

[¶ 53.] A criminal complaint in this case could allege a Class 6 felony, under SDCL 44-1-12 FN22 for the sale of mortgaged property. The Court's interpretation of SDCL 57A-9-609.1 strongly indicates that one in Fin-Ag's position, together with those in the position of the Sale Barns, FN23 should attempt to negotiate an arrangement that might avoid "law enforcement intervention." See supra note 8. No such safe harbor is found in the terms of SDCL 44-1-12. The text of SDCL 44-1-12 makes it clear the crime is committed upon the unauthorized sale or disposition of the encumbered property. With the crime complete, there is no legal effect upon its status by an after the fact notice. That notice only

affects the civil remedies contained in SDCL 57A-9-609.1.

FN22. SDCL 44-1-12 provides:

Any mortgagor or grantor of security interest or other lien or personal property who, while the lien of his mortgage, conditional sales agreement, or security agreement remains in force and unsatisfied, willfully destroy, conceals, sells, or in any manner disposes of or materially injures any part of the property covered by such mortgage, conditional sales agreement, or security agreement without the written consent of the holder of such mortgage, conditional sales agreement, or security agreement, or who willfully abandons the property covered by such mortgage, conditional sales agreement, or security agreement without first giving written notice to such secured party of his intention to abandon such property, or who removes any part of the property covered by such mortgage, conditional sales agreement, or security agreement from the county in which such mortgage, conditional sales agreement, or security agreement is filed except temporarily in accordance with the usual and customary use of the same or similar kinds of property while the lien of his mortgage, conditional sales agreement, or security agreement remains in force and unsatisfied without the written consent of the holder of such mortgage, conditional sales agreement, or security agreement is guilty of a Class 6 felony.(Emphasis added).

FN23. See SDCL 57A-9-609.1, supra note 6, for the list of entities in addition to "livestock auction agenc[ies]" covered under the statute.

[¶ 54.] Our Legislature has not condoned the practice suggested by the Court's interpretation of SDCL 57A-9-609.1. To the contrary, they have indicated their disfavor by enacting a chapter prohibiting obstruction of justice under which our misprision statute is found. If a felony has been committed then a private person has a legal obligation to report it.

"The fundamental mission of a court in interpreting legislative acts is to ascertain and give effect to the intention of the Legislature." Breck v. Janklow, 2001 SD 28, ¶ 20, 623 N.W.2d 449, 457 (citing S.D. Subseq. Injury Fund v. Federated Mut., 2000 SD 11, 18, 605 N.W.2d 166, 170). Clearly, when the Legislature revised the entire criminal code in 2006, they did not modify SDCL 22-11-12 to exclude the duty to report a felony to law enforcement, which would have been necessary under the Court' interpretation of SDCL 57A-9-609.1.

[¶ 55.] The Court cites SDCL 22-30A-32,FN24 22-30A-42 FN25 and 22-30A-19.3 FN26 as *50 supportive of its contention that a legislative intent for civil process to take precedent over a criminal process is nothing new. Closer examination of these statutes actually supports a result contrary to the Court's interpretation of SDCL 57A-9-609.1. This is because all three statutes specifically mandate that the initial notice be sent to the wrong-doer. SDCL 57A-9-609.1 does not.

FN24. SDCL 22-30A-32 provides:

The holder of an insufficient funds check or no account check shall, before presenting the check to the state's attorney for prosecution, serve a notice of dishonor upon the writer of the check, by registered or certified mail, return receipt requested, or by first class mail, supported by an affidavit of mailing sworn and retained by the sender, in the United States mail and addressed to the recipient's most recent address known to the sender. If the notice is mailed, and not returned as undeliverable by the United States Postal Service, notice is conclusively presumed to have been given on the date of mailing. The holder of the dishonored check, whether it be a no account check or insufficient funds check, shall, upon return of the receipt, hold the check for a period

of at least thirty days if notice is given by first class mail, and upon the expiration of that period shall present the check with the attached bank return, return receipt or affidavit of mailing, and copy of the dishonor notice to the state's attorney for prosecution. (Emphasis added).

FN25. SDCL 22-30A-42 provides:

A motor fuel retailer may, within thirty days of the occurrence, demand payment from the motor vehicle owner for the motor fuel received by sending a notice by certified mail, return receipt requested. (Emphasis added).

FN26. SDCL 22-30A-19.3 provides:

Any owner or seller of merchandise who is the victim of retail theft pursuant to SDCL 22-30A-19.1 may make a written demand for the amount for which any person is liable pursuant to SDCL 22-30A-19.1.... The demand for payment shall be mailed by certified mail to the person from whom payment is demanded or served personally on the person from whom payment is demanded. Personal service shall be accomplished in the same manner as the service of a summons. (Emphasis added).

[¶ 56.] SDCL 22-30A-32 passed in 1973 and 22-30A-19.3 passed in 1989, predate the passage of SDCL 57A-9-609.1 in 2000. Since SDCL 22-30A-42 was passed in 2005, after the enactment of SDCL 57A-9-609.1, it is apparent that the Legislature has consistently maintained a policy of specificity when requiring notice be sent to the wrong-doer before a criminal compliant may be signed. "This [C]ourt assumes that statutes mean what they say and that legislators have said what they meant." Petition of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D.1984) (citing Crescent Electric Supply Co. v. Nerison, 89 S.D. 203, 210, 232 N.W.2d 76, 80 (1975)).

[¶ 57.] Moreover, the language mandating the act in SDCL 22-30A-32, 22-30A-19.3 and 22-30A-42 is completely different than the requirement of SDCL 57A-9-609.1. Under the three statutes cited by the Court, the person sending the notice is to send a "notice of dishonor" or a "demand for payment" to the one facing potential criminal prosecution. This is a far cry from the dictates of SDCL 57A-9-609.1 which mandates the victim offer to file "against the debtor, a [criminal] complaint as defined by section 23A-2-1."

[¶ 58.] Thus, it is clear the Legislature was fully aware of how to enact such a requirement of notice to a wrong-doer should it have chosen to do so. However, the text of SDCL 57A-9-609.1 does not contain a requirement of notice to a wrong-doer. The only way the statute can have any effect is to offer to file a criminal complaint with a government agency authorized by law to do something with that complaint.

[¶ 59.] The language of SDCL 57A-9-609.1 is clear. Before filing a civil claim, a plaintiff is required to offer to file a criminal complaint with the Attorney General, a State's Attorney or law enforcement. In other words, prior to commencing litigation and all that that entails, the State must first be given an opportunity to determine*51 whether it has a criminal law enforcement interest in the matter.

[¶ 60.] For the above reasons, I would reverse and remand with instructions to dismiss for failure to comply with SDCL 57A-9-609.1.

SABERS, Justice (dissenting on all Fin-Ag cases on the FSA issue). FN27

FN27. As the opinion acknowledges, this case is similar to Fin-Ag, Inc. v. Cimpl's, Inc., 2008 SD 47, 754 N.W.2d 1, and Fin-Ag Inc. v. Watertown Livestock Auction, Inc., 2008 SD 49, 754 N.W.2d 23. Because these cases are closely related and should be read together, it necessitates that I restate the underlying flaw in the FSA analysis stated in Cimpl's, 2008 SD 47, ¶¶ 10-47, 754 N.W.2d 1, and perpetuated here.

[¶ 61.] Incredibly, Fin-Ag presents this Court with authority from a neighboring state that is virtually on point to the circumstances of this case; yet, the opinion goes out of its way at every opportunity in its analysis of the issues to arrive at the opposite conclusion of the Hufnagle case. Because I cannot agree with the opinion's analysis and conclusions regarding FSA protection, I dissent.

[¶ 62.] In Hufnagle, the lender, Fin-Ag had a perfected security interest in Buck's corn crops. 720 N.W.2d 579, 580 (Minn.2006). Fin-Ag also filed an effective financing statement, "which caused the interest to be listed in Minnesota's central filing system." Id. Meschke was a registered farm products dealer and he received the central filing system's list of sellers whose grain was encumbered by security interests. Id. When Meschke bought corn directly from Buck he, with two exceptions, made the checks payable to Buck and Fin-Ag jointly. Id.

[¶ 63.] Later, Meschke bought corn from persons, the Tookers, who claimed they were the sellers. Id. at 583-84. There was no one by the name Tooker on the central filing system list. Id. Meschke bought corn

from the Tookers seven different times. Id. The proceeds from these seven transactions were deposited in the debtor's (Buck's) account. Id. Fin-Ag was not made a co-payee on any of these checks.

[¶ 64.] Fin-Ag sued Meschke for conversion after Buck failed to repay Fin-Ag. The Minnesota district court granted summary judgment in favor of Fin-Ag. On appeal, the Minnesota Court of Appeals affirmed. Id.

[¶ 65.] The Minnesota Supreme Court held Meschke was liable for conversion. Id. at 581. In doing so, it noted that it must determine "how section 1631 works in the situation of 'fronting' sales. The parties describe 'fronting' as being where a seller of farm products that are subject to a security interest has a third party sell them under the third party's name." Id. at 584. The court recognized that "both Meschke and Fin-Ag can be viewed as innocent parties in the sense that they each did everything they were required or expected to do under the FSA." Id.

[¶ 66.] The buyer, Meschke, made arguments that are similar to the Sale Barns' arguments in this case. For instance, Meschke argued that it is difficult for a buyer of farm products to discover a security interest in a fronting situation and lenders are better suited to police these situations. Sale Barns advanced a virtually identical argument.

[¶ 67.] Despite this argument, and the recognition of the difficulty a fronting situation presents for a buyer, the Minnesota Supreme Court found it was "constrained to apply the plain language of the statutes, as enacted by Congress and the Minnesota

Legislature, and to follow where they lead." Id. at 585. The court noted that *52 the "created by the seller" language was a serious limitation on the FSA's protections afforded to the buyer. Moreover, the language has come under much criticism, but Congress "essentially incorporated this clause in section 1631 when it attempted to correct some of the other shortcomings, from the perspective of buyers, of UCC section 9-307." Id.

[¶ 68.] Due to this limitation, Meschke could not find protection, even in the fronting situation and even though he was an innocent buyer. The court noted:

> The inclusion of the "created by the seller" clause in section 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties. Under the facts of this case, no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest. This is because if we view Buck as the seller, we must conclude that Meschke's rights are subject to Fin Ag's security interest under section 1631 because Fin Ag filed an "effective financing statement" that put Meschke on notice of Fin Ag's security interest in Buck's products. And, if we view the Tookers as the sellers, we must conclude that Meschke's rights are subject to Fin Ag's security interest, under either section 1631 or Minnesota's UCC, because both statutes only protect a buyer from a security interest created by the seller and not from a security interest created by an

> undisclosed owner, which continues in the product despite the sale.

Id. at 586 (emphasis added). Here, the same result is required, if we view Calvin and Michael Berwald as the seller, then Sale Barns' rights are "subject to Fin-Ag's security interest under section 1631" because Fin-Ag filed an "effective financing statement' that put [Sale Barns] on notice...." Id. Alternatively, if we view C & M Dairy as the seller, then "we must conclude that [Sale Barns]' rights are subject to Fin-Ag's security interest" because under section 1631, a buyer is only protected "from a security interest created by the seller and not from a security interest created by an undisclosed owner." See id.

[¶ 69.] Instead, the opinion distinguishes Hufnagle by declaring "fronting" different than using a d.b.a.FN28 It rationalizes that the Hufnagle court did not "consider the fourth factual scenario that is before this Court, i.e., debtors, who created the security interest, and conducted their business under their d.b.a. business name." See Fin-Ag v. Cimpl's, 2008 SD 47, ¶ 31, 754 N.W.2d 1. However, when discussing if C & M Dairy can be a seller under the FSA, the opinion declares that C & M Dairy is an "other business entity," separate and distinct from the Berwalds. Id. ¶ 23 (quoting 7 U.S.C. § 1631(c)(10)). The use of a separate and distinct entity to sell cattle subject to a different owner's security interest is factually analogous to Hufnagle, and is fronting. As the Minnesota Supreme Court noted, "[t]he corn [cattle] had been sold to Meschke [Sale Barns] in the names of third persons [separate entity, C & M Dairy] not involved with the debt to

Fin-Ag." Hufnagle, 720 N.W.2d at 580. This issue should be decided based on the rationale expressed in Hufnagle.

> FN28. The opinion attempts to distinguish the Hufnagle case by explaining a fronting situation only occurs when a separate third person sells the product. However, what about the deliveries where Austin, Arlen, a semi-driver or some other unidentified person delivered cattle to the sale barns? Are these not third persons? Or are we to consider anyone who delivers cattle for C[alvin] & M[ichael] Dairy a part of that fictitious entity?

[¶ 70.] The opinion can call it anything it wants, but it cannot hide what is plain and obvious. In its attempts to decide this case in favor of the Sale Barns, it arrives at some conflicting conclusions. For example, the opinion concludes that C & M Dairy is a "business entity" and therefore separate from Calvin and Michael Berwald and can be a seller under the statute, thus the FSA protects Sale Barns. Then, in the next portion of analysis, C & M Dairy is merely a d.b.a. and cannot be separated from the Berwalds, therefore C & M Dairy created the security interest and again, Sale Barns win. In reality, C & M Dairy is an illegal fiction and definitely a fronting situation. It is not an entity or an alter ego-and certainly not both the "seller" and the "seller who created the security interest."

[¶ 71.] There are two different interpretations of a supposed entity, yet the same strained outcome. When defining "seller," it is inconsistent to say that in one instance C & M Dairy is an entity distinct from the Berwalds, so C & M Dairy can be the seller and claim Sale Barns did not receive notice of Fin-

Ag's security interest, and then to say the Berwalds and C & M Dairy are "one and the same" in order to find C & M Dairy is the "seller who created the security interest." In Hufnagle, the Minnesota Supreme Court specifically refused to "define seller two different ways in the same analysis without a significant indication that this was the legislature's intent. No such indication [of legislative intent] exists here." 720 N.W.2d at 588-89. We should not interpret seller two different ways.

[¶ 72.] We certainly should not interpret seller two different ways when many commentators have criticized the limitation "created by the seller" in the context of 9-307, yet the clause has never been amended or eliminated since the UCC was rewritten in 1957. Hufnagle, 720 N.W.2d at 585 (citing William H. Lawrence, The " Created by His Seller" Limitation of Section 9-309(1) of the UCC: A Provision in Need of an Articulated Policy, 60 Ind. L.J. 73, 73-74 (1984-1985) and Richard H. Nowka, Section 9-302(a) of Reviewed Article 9 and The Buyer in the Ordinary Course of Pre-Encumbered Goods: Something Old and Something New, 38 Brandeis L.J. 9, 23-24 (1999-2000)). Significantly, despite its criticisms, Congress included this clause in section 1631 of the FSA in 1985 when attempting to correct some of the other problems of buying food products under the UCC. See supra ¶ 67 (Sabers, J., dissenting) (citing Hufnagle, 720 N.W.2d at 585).

[¶ 73.] White and Summers have discussed the difficulties with the "created by the seller" language. See 4 White & Summers, Uniform Commercial Code § 33-13 (4th ed. 1995 & Supp. 2007) (discussing the

problems produced by the created by the seller language in former UCC § 9-307). Importantly, they theorize that: "Perhaps the drafters intended that as between two innocent parties the ultimate loss should fall on the party who dealt most closely with the 'bad guy.' " Id. Although this may conflict with the FSA policy, we have to presume that Congress knew what it was doing when it borrowed this language from the UCC.

[¶ 74.] In each of the cases here,FN29 the Sale Barns knew they were dealing with Calvin or Michael Berwald, or both, before *54 they were dealing with "C & M Dairy." Calvin Berwald is the "C" and Michael Berwald is the "M" and the Sale Barns knew it, and they should suffer the ultimate loss. The Sale Barns either took a "head in the sand" approach and let the Berwalds tell them who they were acting as, or they simply decided that even though Berwald and family were listed in the master list, if the Berwalds chose to call themselves something else not mentioned on the list, the Sale Barns took the position they had to go strictly with the list.FN30 In the Watertown Livestock case (2008 SD 49, 754 N.W.2d 23), the decision to go with C & M Dairy as the seller was self-serving, as it allowed the sale barn to collect on a past debt. See Fin-Ag v. Watertown Livestock, Brief of Appellee at 4, 2008 SD 49, 754 N.W.2d 23 (June 18, 2008). In sum, these Sale Barns were more closely dealing with the "bad guy." FN31

FN29. Cimpl's may not have known C & M Dairy as Michael and Calvin Berwald specifically; however the deliveries were made by Austin, Calvin, Michael, or Arlen Berwald. The

other sale barns had received deliveries of cattle from Michael and Calvin Berwald in the past as well.

FN30. Either way, when compared to Hufnagle, these facts make it a much stronger case for Fin-Ag to prevail because in Hufnagle, the buyer was not dealing with the owner/debtor, Buck, but was dealing with completely unrelated sellers, the Tookers. Here, Sale Barns dealt solely with the Berwalds simply using an unregistered, fictitious name. The Sale Barns knew they were dealing with the Berwalds fronting as C & M Dairy. Once again, it is not rocket science that the "C" in C & M Dairy stands for Calvin Berwald, and the "M" in C & M Dairy stands for Michael Berwald, especially when they or their father, Arlen Berwald, delivered the cattle.

FN31. Under South Dakota Law, it is not only a crime to sell mortgaged property without the mortgagee's consent, see SDCL 44-1-12, it is also a crime under SDCL 37-11-1, for any person to engage in or conduct a business for profit in South Dakota "under any name which does not plainly show the true surname of each person interested in such business unless a statement is filed first." (Emphasis added). Furthermore, South Dakota has had a fictitious name certificate statute for at least sixty-nine years. The fictitious name certificate must be filed in the register of deeds office or secretary of state's office. Penalties are provided for failure to file and it constitutes a misdemeanor.Although these issues were not raised in the briefs, the Sale Barns are "presumed to know the law" and should not benefit from two separate violations of the criminal law.

[¶ 75.] It does not end there. Again, in an attempt to distinguish Hufnagle, the opinion indicates that Hufnagle "appeared to involve collusion on the part of the buyer." Cimpl's, 2008 SD 47, ¶ 33, 754 N.W.2d 1. Never mind the fact that the Supreme Court of Minnesota did not rely on that specific fact in its analysis and it is not relevant to the discussion. It merely seeks to cloud the real issues. Indeed, the

court noted that "no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security interest." Id. at 586.

[¶ 76.] The opinion's analysis of this issue in Cimpl's, 2008 SD 47, ¶¶ 10-47, 754 N.W.2d 1, incorporated by reference here, see supra ¶ 21, sends the message to deceitful debtors that they can avoid the security interest if they use their initials as a fictitious name to sell their collateral to sale barns. That opinion blindly accepts the answer of the driver of the cattle truck to the yardman that the seller is "C & M Dairy," even if the driver of the truck is Calvin Berwald, Michael Berwald or their Father, Arlen Berwald. Interpreting the statutes in this manner produces the exact result we should prohibit-absurd. That opinion claims the burden should be on the lender, the party who is more capable of policing this problem. However, it seems it would be next to impossible for a lender to prevent its debtor from creating a fictitious name, with no fictitious name filing, and selling cattle under that name, while it would be relatively easy for the Sale Barn to dig past the fictitious name and inquire *55 as to the proper owner and seller of the cattle.

[¶ 77.] Finally, the opinion in Cimpl's, 2008 SD 47, 754 N.W.2d 1, thoroughly discusses the background of the enactment of the FSA. It details the overarching theme of protecting buyers from the threat of double payment. Then, that opinion finds the statute ambiguous, because seller is not defined, and declares that we must use the policy behind the act to interpret the statute. See Cimpl's, 2008 SD 47,

¶ 20, 754 N.W.2d 1. Thus, according to that opinion, we must interpret the statute to favor the Sale Barns.

[¶ 78.] However, failure to define a term does not automatically result in an ambiguity. Jackson v. Canyon Place Homeowner's Ass'n, 2007 SD 37, ¶ 11, 731 N.W.2d 210, 213 (citing Halls v. White, 2006 SD 47, ¶ 8, 715 N.W.2d 577, 581). Moreover, we consistently only use the plain language of the statute and never examine the policy or legislative history unless the text is ambiguous. "Resorting to legislative history is justified only when legislation is ambiguous, or its literal meaning is absurd or unreasonable. Absent these circumstances, we must give legislation its plain meaning. We cannot amend [the statute] to produce or avoid a particular result." In re Estate of Howe, 2004 SD 118, ¶ 41, 689 N.W.2d 22, 32 (quoting Slama v. Landmann Jungman Hosp., 2002 SD 151, ¶ 7, 654 N.W.2d 826, 828 (quoting Petition of Famous Brands, Inc., 347 N.W.2d 882, 885 (S.D.1984))); see also In re Estate of Olson, 2008 SD 4, ¶ 38, 744 N.W.2d 555, 566; Jensen v. Turner County Bd. of Adjustment, 2007 SD 28, ¶ 5, 730 N.W.2d 411, 413; Goetz v. State, 2001 SD 138, ¶ 16, 636 N.W.2d 675, 681; Reider v. Schmidt, 2000 SD 118, ¶ 9, 616 N.W.2d 476, 479. As Judge Timm noted, "[t]he FSA is not ambiguous, and the seller using a different name does not create an ambiguity in the language of the statute." We should interpret seller consistently. If interpreted consistently and using the plain language of the statute, the Sale Barns are not protected by the FSA. It takes an owner or someone with interest in the property to create a security interest. If Congress meant a fiction

or a front instead of the word seller, it would have said so.

[¶ 79.] There is a scarcity of authority on this issue. We should refuse to engage in statutory interpretation that so heavily favors the Sale Barns to a lender's disadvantage without a clear directive from Congress to do so. The rationale and holding set forth in Hufnagle should be the law of South Dakota.

In summary:

Pipestone (# 23982)

1. I agree with Judge Kean (Retired) and the opinion that Fin Ag's offer complied with SDCL 57A-9-609.1.

2. I would reverse Judge Kean (Retired) on the FSA seller issue for the reasons stated in my writing.

3. I agree that the FSA did not protect Pipestone because Pipestone was acting as a lender (creditor) when it applied the sale proceeds to C & M Dairy's account at Pipestone for prior purchases.

4. Conversion-Because summary judgment was granted on the conversion issue and because there are many genuine issues of material fact (as discussed in Justice Zinter's writing), I agree we should reverse and remand this issue.

5. Damages-Genuine issues of material fact also exist on the damage questions raised in Justice Zinter's writing in paragraphs 41-43 supra and I agree we should reverse and remand for trial.

*56 South Dakota Livestock of Watertown (# 23984)-

1. I agree with Judge Timm and the opinion that Fin-Ag's offer substantially complied with SDCL 57A-9-609.1.

2. I would affirm Judge Timm on the FSA seller issue for the reasons stated in my writing.

3. However, because Judge Timm granted summary judgment on the conversion issue and because there are many genuine issues of material fact (as discussed in Justice Zinter's writing), we must reverse and remand this issue. Moreover, I would reverse and remand the issue whether the EFS description was adequate or seriously misleading as it involves disputed issues of material fact regarding the type of cattle sold and the description of the debtor.

4. Genuine issues of material fact also exist on the damage questions raised in Justice Zinter's writing in paragraphs 41-43 supra and I agree we must reverse and remand for trial.

5. Genuine issues of material fact also exist on the issue whether Fin Ag's security interest was waived or extinguished.

[¶ 80.] KONENKAMP, Justice, joins this dissent.

754 N.W.2d 29, 66 UCC Rep.Serv.2d 43, 2008 SD 48

Supreme Court of Minnesota.
FIN AG, INC., Respondent,
v.
HUFNAGLE, INC., f/k/a P & H Trucking, et al.,
Defendants,
Kent Meschke Poultry Farms, Inc., Appellant.
No. A04-2176.
Aug. 10, 2006.

OPINION

HANSON, Justice.

This case concerns the impact of grain "fronting" on the respective rights of buyers of farm products and those who hold a security interest in those products. The security interest holder, respondent Fin Ag, Inc., brought suit against the buyer, appellant Kent Meschke Poultry Farms, Inc. (Meschke), for conversion of corn grown by the debtors, Larry and Ronda Buck, doing business as Buck Farms (Buck). The corn had been sold to Meschke in the names of third persons not involved with the debt to Fin Ag. The district court granted summary judgment to Fin Ag, holding that, under 7 U.S.C. § 1631 (2000)-enacted as part of the federal Food Security Act of 1985(FSA)-the registration of Fin Ag's security interest in Buck's name put Meschke on notice of the interest and that the appearance of third persons as the sellers did not protect Meschke from the security interest created by Buck. The court of appeals affirmed, holding that Buck had constructive possession of the corn and Meschke had constructive knowledge of the security

interest against Buck's corn. Meschke ***581*** sought further review, arguing that section 1631 requires actual, not constructive, possession or knowledge and that a buyer from a disclosed seller takes title free of a security interest that is in the name of an undisclosed owner. We affirm.

A. *The Statutory Framework.*

To develop a proper framework for the analysis of this case, we must consider the interaction between the state and federal statutes that address the conflict between the rights of buyers of farm products and the rights of those who hold a security interest in those farm products. Because the Minnesota statutes governing security interests in farm products have been revised from time to time, it is helpful to first consider what that interaction was when Congress first enacted 7 U.S.C. § 1631 in response to perceived shortcomings in the Uniform Commercial Code (UCC).

Prior to 1985, the UCC generally reflected a policy that favored the rights of the holders of security interests, presumably to promote the availability of credit on reasonable terms. Thus, UCC section 9-201 recognized that "a security agreement is effective according to its terms between the parties, against purchasers of the collateral and against creditors." U.C.C. § 9-201 (1972) (amended 2000), 3A U.L.A. 651-52 (2000). And the general rule embodied in UCC section 9-306 was that a security interest in goods continues despite the sale of those goods by the debtor. U.C.C. § 9-306 (1972) (amended 2000), 3B U.L.A. 33-34

(2002). That general rule was subject to an exception under UCC section 9-307, where a "buyer in the ordinary course of business" [FN1] could take the goods free of some security interests, but only those that were "created by his seller." U.C.C. § 9-307 (1972) (amended 2000), 3B U.L.A. 154 (2002). But that exception did not apply to buyers of "farm products." *Id.* Thus, the UCC protected buyers in the ordinary course of business only from security interests created by the buyer's seller; and buyers of farm products were excluded from even this narrow protection.[FN2]

FN1. A "buyer in the ordinary course of business" was defined as "a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind." U.C.C. § 1-201(9) (1972) (amended 2000), 1 U.L.A. 155 (2002).

FN2. Although the Commissioners on Uniform State Laws modified Article 9 in 2000, the only relevant change to section 9-307(1) was to renumber it as section 9-320(a). *Compare* U.C.C. § 9-307(1) (1972), 3B U.L.A. 154 (2002), *with* U.C.C. § 9-320(a) (2000), 3 U.L.A. 218 (2002). Prior to the passage of the FSA, Minnesota followed the recommended uniform provisions by adopting the general rule that security interests continue in the goods after they are sold, providing an exception for buyers in the ordinary course, and excluding buyers of farm products from that exception. *See* Minn.Stat. §§ 336.9-306, 336.9-307 (1984). In 2001, Minnesota renumbered the buyer in the ordinary course of business exception to be Minn.Stat. § 336.9-320(a) (2004), following the 2000 changes to the UCC.

The practical effect of the exclusion of farm products from UCC section 9-307 was that buyers of

farm products became guarantors of their seller's debt. As a result, more than a third of the states amended UCC section 9-307 in various ways, generally attempting to reduce the bias in favor of lenders by providing mechanisms that would assist buyers in protecting their interests. Charles W. Wolfe, ***582** *Section 1324 of the Food Security Act of 1985: Congress Preempts the "Farm Products Exception" of Section 9-307(1) of the Uniform Commercial Code,* 55 UMKC L.Rev. 454, 461-64 (1987).[FN3] The various state amendments were not consistent with one another and diluted the uniformity goals of the UCC. Wolfe, *supra,* at 455, 461-64.

FN3. As noted below, Minnesota was counted as one of those states for changes it made to the UCC in 1986. *Wolfe, supra,* at 461 n. 51, 462 n. 63.

Congress became concerned with the impact of the UCC on buyers of farm products and with the inconsistent amendments to UCC section 9-307 by many states. Wolfe, *supra,* at 463. Often, buyers of farm products did not know of a security interest or have any practical way to discover it and thus were required to pay twice for the product-once to the seller and a second time to the security holder if the seller defaulted on the debt. *See* 7 U.S.C. § 1631(a). To address this situation, Congress in 1985 enacted 7 U.S.C. § 1631 (titled "Protection for purchasers of farm products"). Where it applies, section 1631 preempts all conflicting state laws. *See* 7 U.S.C. § 1631(d) (prefacing the statutory rule by stating "notwithstanding any other provision of Federal, State, or local law").

The title and congressional findings of section 1631 suggest that it was intended to protect buyers of farm products from having to make "double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender." 7 U.S.C. § 1631(a)(2). But the protection actually provided by section 1631 was not as sweeping as the statement of intent might suggest. As explained below, section 1631 did not provide that the buyer would take free of all security interests, but instead only established a notice system that provided a mechanism for buyers to protect themselves from some, but not all, security interests.

Section 1631 established, contrary to the UCC, that a buyer of farm products in the ordinary course of business takes free of security interests created by the seller. Section 1631(d) provides:

> Except as provided in subsection (e) of this section and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations *shall take free of a security interest created by the seller,* even though the security interest is perfected; and the buyer knows of the existence of such interest.

7 U.S.C. § 1631(d) (emphasis added). Notably, section 1631(d) adopted the same narrow scope of protection as provided in section 9-307 of the UCC-it only provides protection against a security interest "created by the seller." Therefore, this language

provides no protection for a buyer of farm products from any valid security interest that was created by someone other than the immediate seller.

The federal statute does provide exceptions to section 1631(d). 7 U.S.C. § 1631(e). Under these exceptions a buyer of farm products takes subject to a security interest created by the seller when notice has been given by one of three specified notice procedures. *Id.* Two of the notice procedures apply where states have established central filing systems to provide notice to registered farm product buyers. *Id.*

Minnesota created such a central filing system in 1992. *See generally* Act of April 27, 1992, ch. 525, 1992 Minn. Laws 1322, 1322-34 (codified as amended at Minn.Stat. ch. 336A (2004)). Under Minnesota's system, a lender is authorized to register the security interest with the Secretary of State by filing an "effective financing statement." ***583** Minn.Stat. § 336A.04, subd. 1 (2004). The Secretary of State compiles a list of debtors whose farm products are subject to security interests and makes this list available to registered farm products dealers and to others on request. Minn.Stat. § 336A.08 (2004). Before purchasing farm products, a buyer is expected to check the list. *Cf.* 7 U.S.C. § 1631(e)(2, 3).

At the time of the transactions at issue here, Minnesota's version of UCC section 9-307 had been modified from the uniform provision. Between 1986 and 2001, Minnesota's version of that section eliminated the exclusion for buyers of farm products

from the buyer in the ordinary course exception, meaning that a buyer of farm products could take free of a security interest "created by his seller" if he qualified as a "buyer in the ordinary course of business." *See* Act of March 14, 1986, ch. 322, § 2, 1986 Minn. Laws 20, 21 (codified as Minn.Stat. § 336.9-307 (1998)); Act of April 11, 2000, ch. 399, art. I, § 40, 2000 Minn. Laws 569, 610 (codified as Minn.Stat. § 336.9-320 (2004)). [FN4]

FN4. Following revisions to Article 9 of the UCC, the Minnesota legislature rewrote much of Minnesota's Article 9-based statutes in 2000, at which time section 336.9-307 was repealed and reenacted as section 336.9-320, which again excludes a buyer of farm products from the protection for a buyer in the ordinary course. Act of April 14, 2000, ch. 399, art. 1, §§ 40 (reenactment), 140 (repeal), 2000 Minn. Laws 569, 610, 677.

To summarize, under 7 U.S.C. § 1631 a buyer of farm products in the ordinary course of business (1) takes free of security interests created by the seller, unless notice of the seller-created security interest has been given by one of three specific notice procedures, which include the Minnesota central filing system provided under chapter 336A; but (2) takes subject to security interests created by someone other than the seller. Similarly, under Minnesota's version of the UCC applicable at the time of the subject transactions, a buyer of farm products in the ordinary course of business (1) takes free of security interests created by the seller, but (2) takes subject to a security interest created by someone other than the seller.

B. *The Summary Judgment Record.*

With this legal framework in mind, we turn to the undisputed facts in this record. In 1999, Fin Ag made an operating loan of $249,995 to Buck. As collateral for this loan, Buck granted Fin Ag a security interest in Buck's corn crops for 1999. Fin Ag filed UCC financing statements in Hubbard and Wadena Counties (where the crops were grown), but not in Itasca County (where the Bucks resided). Fin Ag also filed an "effective financing statement" with the Minnesota Secretary of State, which caused the security interest to be listed in Minnesota's central filing system. *See* Minn.Stat. § 336A.04 (2004).

Meschke purchased several loads of corn that were produced by Buck. Because Meschke is a registered farm products dealer, he received an electronic copy of Minnesota's listing from the central filing system of sellers whose grain is subject to security interests. *See* Minn.Stat. § 336A.11 (2004). Meschke learned from the central filing system that Buck's corn was subject to a security interest held by Fin Ag. When Meschke bought corn directly from Buck, he generally included Fin Ag's name on the check. But twice Meschke bought corn directly from Buck without making the check payable to both Buck and Fin Ag; the amount of these sales was $7,129.24. Meschke does not dispute Fin Ag's claims with regard to these two payments.

Meschke was also offered corn by persons who claimed that the sellers were, ***584*** variously, Mark Tooker, Mickey Buck, Paul Zuk, and Ryan Buck (collectively the Tookers).[FN5] The Tookers were not

listed in the central filing as having corn that was subject to any security interest. Meschke made payment for this corn solely in the names of the Tookers. Meschke bought corn from the Tookers on seven separate occasions and paid a total of $38,443.85. Each of the checks to the Tookers was subsequently deposited into Buck's bank account but was not applied to Buck's debt to Fin Ag.

FN5. Mark Tooker and Paul Zuk were employees of the Bucks. The parties agree that Mickey and Ryan Buck were Ronda and Larry Buck's minor children.

When Buck failed to repay the Fin Ag loan, Fin Ag sued Meschke for conversion of Fin Ag's collateral in the corn that was involved in the Tooker sales and the two Buck sales. Fin Ag moved for summary judgment against Meschke. Meschke opposed the motion, arguing that he was entitled to take the corn free of Fin Ag's security interest under 7 U.S.C. § 1631 because he did not receive notice of Fin Ag's security interest when he checked the central filing system for the names of the Tookers. The district court granted summary judgment in favor of Fin Ag, awarding damages for the seven Tooker sales and two Buck sales in the amount of $45,573.09, plus costs and interest. The court of appeals affirmed, and we granted Meschke's petition for review.

I.

We review a grant of summary judgment to determine whether there are any genuine issues of material fact and whether the district court erred in

applying the law to the facts. *Westrom v. Minn. Dep't of Labor and Indus.*, 686 N.W.2d 27, 32 (Minn.2004). We view the evidence in the light most favorable to the party against whom summary judgment was granted. *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 369 (Minn.2005). Statutory construction is a question of law subject to de novo review. *Vlahos v. R & I Constr. of Bloomington, Inc.*, 676 N.W.2d 672, 679 (Minn.2004).

The record submitted in connection with Fin Ag's motion for summary judgment does not fully explain the circumstance under which the Tookers became involved with the sales to Meschke. Conceivably, the Tookers could have been involved in any one of three capacities: (1) as agents selling on behalf of Buck as an undisclosed principal; (2) as "commission merchants" or "selling agents," defined terms under 7 U.S.C. § 1631(c)(3, 8) (2000); or (3) as owners of the corn, selling on their own behalf. Although there may be genuine issues of fact concerning which of those three capacities applies to the sales to Meschke, Fin Ag argues that those issues of fact are not material, and do not preclude summary judgment, because Meschke would take the corn subject to Fin Ag's security interest under each of these alternative capacities.

Fin Ag's argument requires us to consider how section 1631 works in the situation of "fronting" sales. The parties describe "fronting" as being where a seller of farm products that are subject to a security interest has a third party sell them under the third party's name. Here, Meschke bought the

corn from the Tookers and, when Meschke checked the central filing system, he found no security interests listed in the Tookers' names. As a result, both Meschke and Fin Ag can be viewed as innocent parties in the sense that they each did everything they were required or expected to do under the FSA.

Meschke advances several policy-based arguments that emphasize how difficult it ***585** is for a buyer of farm products to discover a security interest in a fronting situation. We recognize that difficulty, but we are constrained to apply the plain language of the statutes, as enacted by Congress and the Minnesota Legislature, and to follow where they lead. The difficulty with those statutes, as highlighted earlier, is that the protection for the buyer is narrowly limited by the clause "created by the seller."

The presence of this limitation in UCC section 9-307 has received much criticism, both from the courts and scholars. *See* William H. Lawrence, *The "Created by His Seller" Limitation of Section 9-309(1) of the UCC: A Provision in Need of an Articulated Policy*, 60 Ind. L.J. 73, 73-74 (1984-85). Yet, all efforts to eliminate or amend this clause have failed since the UCC was rewritten in 1957. *See* Richard H. Nowka, *Section 9-302(a) of Reviewed Article 9 and The Buyer in the Ordinary Course of Pre-Encumbered Goods: Something Old and Something New*, 38 Brandeis L.J. 9, 23-24 (1999-2000). And, as noted, Congress essentially incorporated this clause in section 1631 when it attempted to correct some of the other shortcomings, from the perspective of buyers, of UCC section 9-307.

Neither Congress nor the Commissioners on Uniform State Laws have enunciated a policy reason for this clause.[FN6] *See* Nowka, *supra,* at 23. But the Official Comment to section 9-320, when revised and renumbered in 2000, makes it clear that the "created by the buyer's seller" clause is a serious limitation on the rights of buyers in the ordinary course of business, citing this example:

> FN6. One commentator suggests the following:Thus, the policy underlying the "created by his seller" language is to limit the exception to security interest validity codified in section 9-307(1) to cases in which the secured party has clothed the debtor with the indicia of apparent authority to sell the goods. Nonpossessory inventory financing establishes apparent authority in dealer-debtors to sell to buyers in ordinary course because (1) the intended result of inventory financing is sale of the collateral to third persons, (2) the sale is facilitated by entrusting the collateral to dealer-debtors in the business of selling goods of the kind compromising the collateral, and (3) most of these sales are made pursuant to actual secured party authorization. Debtor sales of consumer goods and equipment are distinguishable. Improper sales of these categories of collateral generally do not occur, nor are they expected to occur; therefore, secured parties have been relieved of the burden of policing such sales. The absence of apparent authority to sell is the justification for continuing the validity of the security interest in such situations even against a buyer in ordinary course of business.
>
> Lawrence, *supra,* at 87.

Manufacturer, who is in the business of manufacturing appliances, owns manufacturing equipment subject to the perfected security interest in favor of Lender. Manufacturer sells the equipment to Dealer, who is in the business of buying and selling used equipment. Buyer buys the

equipment from Dealer. Even if Buyer qualifies as a buyer in the ordinary course of business, Buyer does not take free of Lender's security interest under subsection (a) [of section 9-320], because Dealer did not create the security interest; Manufacturer did.

U.C.C. § 9-320, official cmt. 3 (2000), 3 U.L.A. 219-20 (2002).

The inclusion of the "created by the seller" clause in section 1631 means that the statute does not provide protection for buyers in a fronting situation where the security interest from which protection is sought was not created by the fronting parties. Under the facts of this case, no matter what factual assumptions we make, there are none under which Meschke could take the corn free of Fin Ag's security ***586** interest. This is because if we view Buck as the seller, we must conclude that Meschke's rights are subject to Fin Ag's security interest under section 1631 because Fin Ag filed an "effective financing statement" that put Meschke on notice of Fin Ag's security interest in Buck's products. And, if we view the Tookers as the sellers, we must conclude that Meschke's rights are subject to Fin Ag's security interest, under either section 1631 or Minnesota's UCC, because both statutes only protect a buyer from a security interest created by the seller and not from a security interest created by an undisclosed owner, which continues in the product despite the sale.

II.

We first analyze the transactions under 7 U.S.C. § 1631. As noted, the rule under section 1631 is that a qualified buyer takes free of a security interest "created by the seller." 7 U.S.C. § 1631(d). Thus, the first question is who was Meschke's "seller." Section 1631 does not define "seller." *See* 7 U.S.C. § 1631(c). Under our facts, Meschke's "seller" could be either Buck (as the undisclosed principal of the sale) or the Tookers (as those who were identified as the sellers when the transactions occurred). But we need not resolve that ambiguity because neither alternative would allow Meschke to take the corn free of Fin Ag's security interest under section 1631.

The court of appeals treated Buck as the seller, concluding that Buck had constructive possession of the corn and Meschke had constructive knowledge of Fin Ag's security interest in Buck's corn. We doubt that constructive notice or constructive knowledge are viable concepts under section 1631, but we need not reach that issue. If we consider the application of section 1631 under each alternative-with either Buck as the seller or the Tookers as the sellers-we come to the same conclusion.

If we view Buck as the seller, assuming that the Tookers sold the corn as agents for Buck as an undisclosed principal, the exception in section 1631(e) for a security interest as to which notice has been given would apply because Meschke received notice of Fin Ag's interest against Buck, and Meschke did not secure a waiver of the interest from Fin Ag. *See* 7 U.S.C. § 1631(e)(3). Accordingly, Meschke's interest in the corn would be subject to Fin Ag's security interest. *See id.*

If we treat the Tookers as the sellers, assuming that the Tookers sold the corn on their own behalf, we need to consider whether they sold the corn as a "commission merchant" or as "selling agents," as defined by section 1631, or as owners, having taken title to the corn (by purchase or gift).

If the Tookers sold the corn as "commission merchants" or as "selling agents," [FN7] section 1631 provides that such a merchant or agent is subject to the security interest created by the seller if the "commission merchant or selling agent has failed to register with the Secretary of State" and the "secured party has filed an effective ***587** financing statement that covers the farm products being sold" in a state that has a central filing system. 7 U.S.C. § 1631(g)(2)(C). There is no evidence that the Tookers registered as commission merchants or as selling agents.

FN7. A "commission merchant" is defined as "any person engaged in the business of receiving any farm product for sale or commission, or for or on behalf of another person." 7 U.S.C. § 1631(c)(3) (2002). A "selling agent" is defined as "any person, other than a commission merchant, who is engaged in the business of negotiating the sale and purchase of any farm product on behalf of a person engaged in farming operations." 7 U.S.C. § 1631(c)(8) (2002). The Tookers could qualify as one or the other, depending on the terms under which they made the sale for Buck, if they were in the business of making/receiving products for sale, or of making such a sale.

If the Tookers took title to the corn and sold to Meschke on their own behalf, they would have taken title subject to Fin Ag's security interest because Fin Ag filed an effective financing

statement with the Secretary of State and there is no evidence that the Tookers registered with the Secretary of State. *See* 7 U.S.C. § 1631(e)(2). And if the Tookers took title to the grain subject to Fin Ag's security interest, their sale to Meschke would only be free of any security interest created by the Tookers, and would be subject to Fin Ag's security interest because it was created by Buck. *See* 7 U.S.C. § 1631(d).

Thus, if the transaction is governed by section 1631 and we consider all of the factual scenarios possible on this record, we must conclude that Meschke took the corn subject to Fin Ag's security interest.

The only other possible analysis that could be made is to assume that the transfer of possession by Buck to the Tookers transformed the corn from a "farm product," covered by section 1631, to "inventory," not covered by section 1631. Because that analysis is not made under section 1631, we will discuss it under the analysis of the UCC below. *See* 7 U.S.C. § 1631(c)(5).

III.

It is possible that the corn ceased being a "farm product" and became "inventory" after it was acquired from Buck to the Tookers. *See, e.g., United States v. Hext,* 444 F.2d 804, 813-15 (5th Cir.1971) (holding that the sale of cotton by a farmer to his wholly owned ginning company meant that the cotton became inventory and was no longer a farm product); *Baker Prod. Credit Ass'n v. Long Creek*

*Meat Co., Inc.*, 266 Or. 643, 513 P.2d 1129, 1132 (1973) (holding that, after slaughtering, cattle were no longer "farm products" but inventory); *First Bank of N.D. v. The Pillsbury Co.*, 801 F.2d 1036, 1038-39 (8th Cir.1986) (holding that the sale of grain by a farmer to his wholly owned elevator company converted the grain from a farm product to inventory). If so, a subsequent sale by the Tookers to Meschke would be governed by Minn.Stat. § 336.9-307 (1998), not section 1631, which only applies to "farm products." But the result would be the same because Minn.Stat. § 336.9-307 (1998), like section 1631, provides no protection for security interests not "created by the seller."

Meschke argues that the burden of hidden liens should be on the lender, who has an "ongoing relationship with the debtor" and is "able to monitor the debtor's activities, including sales through intermediaries." Meschke relies on the Eighth Circuit decision in *First Bank*, 801 F.2d at 1038, for the proposition that, because lenders know that the goods they are financing may become inventory that will be purchased by innocent buyers in the ordinary course of business, the risk of such transactions should be placed on the lenders. Although we recognize the policy considerations that underlie Meschke's argument, we are constrained to conclude that the Minnesota Legislature has made other policy choices. As a result, we conclude that *First Bank* does not constitute good law, at least under Minnesota's version of the UCC.

*First Bank* involved a situation where the farmer sold grain in which the bank had a security interest to a grain elevator that the farmer owned but did not operate. *First Bank*, 801 F.2d at 1037. The grain elevator then commingled the grain with ***588** other grain, and sold a portion of the commingled grain to Pillsbury. *Id.* The farmer and the grain elevator later went bankrupt, and the bank sued Pillsbury for conversion of the bank's collateral. *Id.* at 1037-38. The North Dakota UCC was the applicable law and it provided: "A buyer in the ordinary course of business * * * other than a person buying farm products from a person engaged in farming operations takes free of a security interest created by his seller." *Id.* at 1038 (quoting N.D. Cent.Code § 41-09-28(1) (1983)). The Eighth Circuit first concluded that the grain was not a "farm product" in the sale between the grain elevator and Pillsbury by treating the elevator as a separate legal person who was not engaged in farm operations and thus was selling "inventory" that had lost its character as a farm product. *Id.* But, for purposes of applying the "created by his seller" limitation, the Eighth Circuit treated the farmers as the sellers, stating:

> In our case, it is clear that the elevator was the marketing agency for the [farmers]. Because the [farmers] were the owners of the elevator, and this fact was well known to the bank, we find that the lien was in fact and in law created by Pillsbury's seller.

*Id.* at 1040.

In sum, for the purposes of the "created by his seller" limitation, the Eighth Circuit considered the farmers to be "the seller" because they owned the grain elevator, but for the purposes of the "farm product" exclusion, the Eighth Circuit considered the separately incorporated grain elevator to be "the seller." *Id.* at 1038, 1040. The Eighth Circuit relied on *Hext,* 444 F.2d 804. *First Bank,* 801 F.2d at 1038, 1040. One commentator supports the analysis made in *Hext* arguing:

> Severance of the security interest under this analysis appears to depend on an inconsistent manipulation of the agency status of the auctioneer. On one hand, the agency relationship removes the collateral from the farmer's control so as to convert it from farm products into inventory. On the other hand, the agency relationship relates the collateral back to the farmer in order to avoid the created-by-his-seller limitation. Even if manipulation of the agency concept were the basis of the argument, this would not constitute a dispositive criticism in light of the desirability of the result, as well as the inherent flexibility and remedial nature of agency doctrine. In fact, the solution results directly from the Code's system of collateral classification which allows property to change categories. Since the present transformation-from farm products to inventory-follows from a change in possession, it fully comports with the pervasive Article 9 policy of keying alterations of property rights to observable physical events. Under this approach, the courts can still control collusive

practices by reference to the prerequisites of buyer-in-the ordinary-course status.

Robert Dugan, *Buyer-Secured Party Conflicts Under Section 9-307(1) of the Uniform Commercial Code,* 46 U. Colo. L.Rev. 333, 355-56 (1975). But another commentator criticizes the *Hext* analysis stating:

The court in *Hext* failed to distinguish that the security interest was created by the farmer and not the seller. That the court was willing to look past this fact indicates a blatant bias towards buyers of farm products and portrays a type of judicial circumvention which is used to avoid the farm products exception.

Wolfe, *supra,* at 480 n. 183.

We cannot follow the Eighth Circuit down a path that would require us to define seller two different ways in the same analysis without a significant indication***589*** that this was the legislature's intent. No such indication exists here. Accordingly, if we examine the transactions under the UCC, we must conclude that Meschke took the corn subject to Fin Ag's security interest.

IV.

As an alternative argument, Meschke points out that Fin Ag did not file its financing statement in the correct county, and claims that the security interest therefore was not perfected. Fin Ag argues that, while it did not file in the correct county, its

security interest was still perfected under the "good faith" exception to the filing rule.

To perfect a security interest, the lender must file a UCC-1 financing statement. *See* Minn.Stat. §§ 336.9-302, 336.9-401 (1998). Under Minnesota law as it existed in 1999, the required place of filing depended on the nature of the collateral as well as the identity and residence of the debtor. *See* Minn.Stat. § 336.9-401 (1998). For crops, the lender was required to file its UCC-1 financing statement in the county of the debtor's residence. Minn.Stat. § 336.9-401(1)(b) (1998). But, if the lender has filed in an incorrect place, or in fewer than all of the required locations, the security interest can still be considered effective if the filing satisfied a good faith exception:

> A filing which is made *in good faith* in an improper place or not in all of the places required by this section is nevertheless effective with regard to any collateral as to which the filing complied with the requirements of this article and *is also effective* with regard to collateral covered by the financing statement *against any person who has knowledge of the contents of such financing statement.*

Minn.Stat. § 336.9-401(2) (1998) (emphasis added).

Although Fin Ag did not file its financing statement in the correct county, it fulfilled the terms of the good faith exception because it is undisputed that Meschke knew of Fin Ag's security

interest in Buck's farm products from the electronic listing of Minnesota's central filing system, which he had actually accessed. Meschke had made checks payable to both Fin Ag and Buck for some of the corn sold directly by Buck, based on the information provided to Meschke from the central filing system. Thus, Fin Ag's security interest was effective against Meschke.

Affirmed.

Minn.,2006.
Fin Ag, Inc. v. Hufnagle, Inc.
720 N.W.2d 579, 60 UCC Rep.Serv.2d 629

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
* * * *

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JULY 29, 2008

Clerk

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| **FIN-AG, INC.,** | ) | |
| **Plaintiff and** | ) | **ORDER DENYING** |
| **Appellant,** | ) | **PETITION FOR** |
| | ) | **REHEARING** |
| **vs.** | ) | |
| | ) | **#24172** |
| **CIMPL'S, INC.,** | ) | |
| **Defendant and** | ) | |
| **Appellee,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **DACOTAH BANK** | ) | |
| **Defendant.** | ) | |

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A petition for rehearing in the above cause having been filed by Fin-Ag, Inc., July 8, 2008, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 29th day of July, 2008.

BY THE COURT

/s/ David Gilbertson
David Gilbertson, Chief Justice

ATTEST:

/s/ Shirley Jameson-Fergel
Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice David Gilbertson, Justices Richard W. Sabers, John K. Konenkamp, Steven L. Zinter and Judith K. Meierhenry.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

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SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JULY 29, 2008

Clerk

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| **FIN-AG, INC.,** | ) | |
| **Plaintiff and** | ) | **ORDER DENYING** |
| **Appellee,** | ) | **PETITION FOR** |
| | ) | **REHEARING** |
| **vs.** | ) | |
| | ) | **#24050** |
| **WATERTOWN LIVE-** | ) | |
| **STOCK AUCTION,** | ) | |
| **INC.,** | ) | |
| **Defendant and** | ) | |
| **Appellant,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **DACOTAH BANK** | ) | |
| **Defendant.** | ) | |

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This matter came before the Court on a Petition for Rehearing filed by Fin-Ag, Inc., July 8, 2008. Although the Petition for Rehearing is denied by a vote of 3 to 2, the Court deems it necessary to explain that Watertown Livestock Auction, Inc., was not entitled to FSA protection when it acted as a lender and that, therefore, the results of the Watertown case and the Pipestone case are the same and consistent.

DATED at Pierre, South Dakota, this 29th day of July, 2008.

BY THE COURT

/s/ David Gilbertson
David Gilbertson, Chief Justice

ATTEST:

/s/ Shirley Jameson-Fergel
Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice David Gilbertson, Justices Richard W. Sabers, John K. Konenkamp, Steven L. Zinter and Judith K. Meierhenry.

Justices Sabers and Konenkamp dissent as they voted to grant the Petition on the merits.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA
* * * *

SUPREME COURT
STATE OF SOUTH DAKOTA
FILED
JULY 29, 2008

Clerk

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|---|---|---|
| **FIN-AG, INC.,** | ) | |
| **Plaintiff and** | ) | **ORDER DENYING** |
| **Appellee,** | ) | **PETITION FOR** |
| | ) | **REHEARING** |
| **vs.** | ) | |
| | ) | **#23982, #24001** |
| **PIPESTONE LIVE-** | ) | **#23984** |
| **STOCK AUCTION** | ) | |
| **MARKET INC.,** | ) | |
| **Defendant and** | ) | |
| **Appellant,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | |
| **DACOTAH BANK** | ) | |
| **Defendant.** | ) | |

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A Petition for Rehearing in the above cause having been filed by Fin-Ag, Inc., July 8, 2008, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices requesting a rehearing, now, therefore, in accordance with the

Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 29th day of July, 2008.

BY THE COURT

/s/ David Gilbertson
David Gilbertson, Chief Justice

ATTEST:

/s/ Shirley Jameson-Fergel
Clerk of the Supreme Court
(SEAL)

PARTICIPATING: Chief Justice David Gilbertson, Justices Richard W. Sabers, John K. Konenkamp, Steven L. Zinter and Judith K. Meierhenry.

7 U.S.C.A. § 1631
United States Code Annotated
Title 7. Agriculture

## § 1631. Protection for purchasers of farm products

(a) Congressional findings

Congress finds that--

**(1)** certain State laws permit a secured lender to enforce liens against a purchaser of farm products even if the purchaser does not know that the sale of the products violates the lender's security interest in the products, lacks any practical method for discovering the existence of the security interest, and has no reasonable means to ensure that the seller uses the sales proceeds to repay the lender;

**(2)** these laws subject the purchaser of farm products to double payment for the products, once at the time of purchase, and again when the seller fails to repay the lender;

**(3)** the exposure of purchasers of farm products to double payment inhibits free competition in the market for farm products; and

**(4)** this exposure constitutes a burden on and an obstruction to interstate commerce in farm products.

(b) Declaration of purpose

The purpose of this section is to remove such burden on and obstruction to interstate commerce in farm products.

(c) Definitions

For the purposes of this section--

**(1)** The term "buyer in the ordinary course of business" means a person who, in the ordinary course of business, buys farm products from a person engaged in farming operations who is in the business of selling farm products.

**(2)** The term "central filing system" means a system for filing effective financing statements or notice of such financing statements on a statewide basis and which has been certified by the Secretary of the United States Department of Agriculture; the Secretary shall certify such system if the system complies with the requirements of this section; specifically under such system--

**(A)** effective financing statements or notice of such financing statements are filed with the office of the Secretary of State of a State;

**(B)** the Secretary of State records the date and hour of the filing of such statements;

**(C)** the Secretary of State compiles all such statements into a master list--

(i) organized according to farm products;

(ii) arranged within each such product-

(I) in alphabetical order according to the last name of the individual debtors, or, in the case of debtors doing business other than as individuals, the first word in the name of such debtors; and

(II) in numerical order according to the social security number, or other approved unique identifier, of the individual debtors or, in the case of debtors doing business other than as individuals, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtors, except that the numerical list containing social security or taxpayer identification numbers may be encrypted for security purposes if the Secretary of State provides a method by which an effective search of the encrypted numbers may be conducted to determine whether the farm product at issue is subject to 1 or more liens; and

(III) geographically by county or parish; and

(IV) by crop year;

**(iii)** containing the information referred to in paragraph (4)(D);

**(D)** the Secretary of State maintains a list of all buyers of farm products, commission merchants, and selling agents who register with the Secretary of State, on a form indicating--

**(i)** the name and address of each buyer, commission merchant and selling agent;

**(ii)** the interest of each buyer, commission merchant, and selling agent in receiving the lists described in subparagraph (E); and

**(iii)** the farm products in which each buyer, commission merchant, and selling agent has an interest;

**(E)** the Secretary of State distributes regularly as prescribed by the State to each buyer, commission merchant, and selling agent on the list described in subparagraph (D) a copy in written or printed form of those portions of the master list described in subparagraph (C) that cover the farm products in which such buyer, commission merchant, or selling agent has registered an interest except that--

**(i)** the distribution of the portion of the master list may be in electronic, written, or printed form; and

**(ii)** if social security or taxpayer identification numbers on the master list are encrypted, the Secretary of State may distribute the master list only--

**(I)** by compact disc or other electronic media that contains--

**(aa)** the recorded list of debtor names; and

**(bb)** an encryption program that enables the buyer, commission merchant, and selling agent to enter a social security number for matching against the recorded list of encrypted social security or taxpayer identification numbers; and

**(II)** on the written request of the buyer, commission merchant, or selling agent, by paper copy of the list to the requestor;

**(F)** the Secretary of State furnishes to those who are not registered pursuant to (2)(D) of this section [FN1] oral confirmation within 24 hours of any effective financing statement on request followed by written confirmation to any buyer of farm products buying from a

debtor, or commission merchant or selling agent selling for a seller covered by such statement.

**(3)** The term "commission merchant" means any person engaged in the business of receiving any farm product for sale, on commission, or for or on behalf of another person.

**(4)** The term "effective financing statement" means a statement that--

**(A)** is an original or reproduced copy of the statement, or, in the case of a State which (under the applicable State law provisions of the Uniform Commercial Code) allows the electronic filing of financing statements without the signature of the debtor, is an electronically reproduced copy of the statement;

**(B)** other than in the case of an electronically reproduced copy of the statement, is signed, authorized, or otherwise authenticated by the debtor, and filed with the Secretary of State of a State by the secured party;

**(C)** contains,

**(i)** the name and address of the secured party;

**(ii)** the name and address of the person indebted to the secured party;

**(iii)** the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and

**(iv)** a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable, and the name of each county or parish in which the farm products are produced or located;

**(D)** must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated by the debtor and filed, to reflect material changes;

**(E)** remains effective for a period of 5 years from the date of filing, subject to extensions for additional periods of 5 years each by refiling or filing a continuation statement within 6 months before the expiration of the initial 5 year period;

**(F)** lapses on either the expiration of the effective period of the statement or the filing of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first;

**(G)** is accompanied by the requisite filing fee set by the Secretary of State; and

**(H)** substantially complies with the requirements of this subparagraph even though it contains minor errors that are not seriously misleading.

**(I)** Redesignated (H)

**(5)** **[FN2]** The term "farm product" means an agricultural commodity such as wheat, corn, soybeans, or a species of livestock such as cattle, hogs, sheep, horses, or poultry used or produced in farming operations, or a product of such crop or livestock in its unmanufactured state (such as ginned cotton, wool-clip, maple syrup, milk, and eggs), that is in the possession of a person engaged in farming operations.

**(5)** **[FN3]** The term "approved unique identifier" means a number, combination of numbers and letters, or other identifier selected by the Secretary of State using a selection system or method approved by the Secretary of Agriculture.

**(6)** The term "knows" or "knowledge" means actual knowledge.

**(7)** The term "security interest" means an interest in farm products that secures payment or performance of an obligation.

**(8)** The term "selling agent" means any person, other than a commission merchant, who is engaged in the business of negotiating the sale and purchase of any farm product on behalf of a person engaged in farming operations.

**(9)** The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, the Commonwealth of the Northern Mariana Islands, or the Trust Territory of the Pacific Islands.

**(10)** The term "person" means any individual, partnership, corporation, trust, or any other business entity.

**(11)** The term "Secretary of State" means the Secretary of State or the designee of the State.

(d) Purchases free of security interest

Except as provided in subsection (e) of this section and notwithstanding any other provision of Federal, State, or local law, a buyer who in the ordinary course of business buys a farm product from a seller engaged in farming operations shall take free of a security interest created by the seller, even though the security interest is perfected; and the buyer knows of the existence of such interest.

(e) Purchases subject to security interest

A buyer of farm products takes subject to a security interest created by the seller if--

**(1)(A)** within 1 year before the sale of the farm products, the buyer has received from the secured party or the seller written notice of the security interest organized according to farm products that--

**(i)** is an original or reproduced copy thereof;

**(ii)** contains,

**(I)** the name and address of the secured party;

**(II)** the name and address of the person indebted to the secured party;

**(III)** the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and

**(IV)** a description of the farm products subject to the security interest created by the debtor, including the amount of such products where applicable, crop year, and the name of each county or

parish in which the farm products are produced or located;

**(iii)** must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated and transmitted, to reflect material changes;

**(iv)** will lapse on either the expiration period of the statement or the transmission of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first; and

**(v)** contains any payment obligations imposed on the buyer by the secured party as conditions for waiver or release of the security interest; and

**(B)** the buyer has failed to perform the payment obligations, or

**(2)** in the case of a farm product produced in a State that has established a central filing system--

**(A)** the buyer has failed to register with the Secretary of State of such State prior to the purchase of farm products; and

**(B)** the secured party has filed an effective financing statement or notice that covers the farm products being sold; or

**(3)** in the case of a farm product produced in a State that has established a central filing system, the buyer--

> **(A)** receives from the Secretary of State of such State written notice as provided in subsection (c)(2)(E) or (c)(2)(F) that specifies both the seller and the farm product being sold by such seller as being subject to an effective financing statement or notice; and
>
> **(B)** does not secure a waiver or release of the security interest specified in such effective financing statement or notice from the secured party by performing any payment obligation or otherwise.

(f) Law governing "receipt"

What constitutes receipt, as used in this section, shall be determined by the law of the State in which the buyer resides.

(g) Commission merchants or selling agents: sales free of or subject to security interest; law governing "receipt"

**(1)** Except as provided in paragraph (2) and notwithstanding any other provision of Federal, State, or local law, a commission merchant or selling agent who sells, in the ordinary course of business, a farm product for others, shall not be subject to a security interest created by the seller in such farm product even though the security interest is perfected and even though the commission

merchant or selling agent knows of the existence of such interest.

**(2)** A commission merchant or selling agent who sells a farm product for others shall be subject to a security interest created by the seller in such farm product if--

> **(A)** within 1 year before the sale of such farm product the commission merchant or selling agent has received from the secured party or the seller written notice of the security interest; organized according to farm products, that--
>
> > **(i)** is an original or reproduced copy thereof;
> >
> > **(ii)** contains,
> >
> > > **(I)** the name and address of the secured party;
> > >
> > > **(II)** the name and address of the person indebted to the secured party;
> > >
> > > **(III)** the social security number, or other approved unique identifier, of the debtor or, in the case of a debtor doing business other than as an individual, the Internal Revenue Service taxpayer identification number, or other approved unique identifier, of such debtor; and

**(IV)** a description of the farm products subject to the security interest created by the debtor, including the amount of such products, where applicable, crop year, and the name of each county or parish in which the farm products are produced or located;

**(iii)** must be amended in writing, within 3 months, similarly signed, authorized, or otherwise authenticated and transmitted, to reflect material changes;

**(iv)** will lapse on either the expiration period of the statement or the transmission of a notice signed, authorized, or otherwise authenticated by the secured party that the statement has lapsed, whichever occurs first; and

**(v)** contains any payment obligations imposed on the commission merchant or selling agent by the secured party as conditions for waiver or release of the security interest; and

**(B)** the commission merchant or selling agent has failed to perform the payment obligations;

**(C)** in the case of a farm product produced in a State that has established a central filing system--

**(i)** the commission merchant or selling agent has failed to register with the Secretary of State of such State prior to the purchase of farm products; and

**(ii)** the secured party has filed an effective financing statement or notice that covers the farm products being sold; or

**(D)** in the case of a farm product produced in a State that has established a central filing system, the commission merchant or selling agent--

**(i)** receives from the Secretary of State of such State written notice as provided in subsection (c)(2)(E) or (c)(2)(F) of this section that specifies both the seller and the farm products being sold by such seller as being subject to an effective financing statement or notice; and

**(ii)** does not secure a waiver or release of the security interest specified in such effective financing statement or notice from the secured party by performing any payment obligation or otherwise.

**(3)** What constitutes receipt, as used in this section, shall be determined by the law of the State in which the buyer resides.

(h) Security agreements; identity lists; notice of identity or accounting for proceeds; violations

**(1)** A security agreement in which a person engaged in farming operations creates a security interest in a farm product may require the person to furnish to the secured party a list of the buyers, commission merchants, and selling agents to or through whom the person engaged in farming operations may sell such farm product.

**(2)** If a security agreement contains a provision described in paragraph (1) and such person engaged in farming operations sells the farm product collateral to a buyer or through a commission merchant or selling agent not included on such list, the person engaged in farming operations shall be subject to paragraph (3) unless the person--

> **(A)** has notified the secured party in writing of the identity of the buyer, commission merchant, or selling agent at least 7 days prior to such sale; or
>
> **(B)** has accounted to the secured party for the proceeds of such sale not later than 10 days after such sale.

**(3)** A person violating paragraph (2) shall be fined $5,000 or 15 per centum of the value or benefit received for such farm product described in the security agreement, whichever is greater.

(i) Regulations

The Secretary of Agriculture shall prescribe regulations not later than 90 days after December 23, 1985, to aid States in the implementation and management of a central filing system.

(j) Effective date

This section shall become effective 12 months after December 23, 1985.

CREDIT(S)

(Pub.L. 99-198, Title XIII, § 1324, Dec. 23, 1985, 99 Stat. 1535; Pub.L. 104-127, Title VI, § 662, Apr. 4, 1996, 110 Stat. 1107; Pub.L. 107-171, Title X, § 10604, May 13, 2002, 116 Stat. 512; Pub.L. 108-447, Div. A, Title VII, § 776, Dec. 8, 2004, 118 Stat. 2849; Pub.L. 110-234, Title XIV, § 14215, May 22, 2008, 122 Stat. 1466; Pub.L. 110-246, Title XIV, § 14215, June 18, 2008, 122 Stat. 2228.)

[FN1] So in original. Probably should be "pursuant to subparagraph (D)".

[FN2] So in original. Another par. (5) follows par. (11).

[FN3] So in original. Another par. (5) follows par. (4).